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HENRY J. WILLIAMS, Appellant,

vs.

THE LIBRARY COMPANY OF PHILADELPHIA, Appellees.

Supreme Court

Of January Term, 1873. No.

APPEAL FROM SUPREME COURT AT NISI PRIUS.

PAPER-BOOK OF APPELLANT AND DEFENDANT BELOW.

CONTENTS.

JOHN G. JOHNSON,
GEORGE JUNKIN,
GEO. W. WOODWARD,
for Appellant.

COLLINS, PRINTER.

5

I. *Copy of Docket Entries.*

JULY TERM, 1873.

Wm. Henry Rawle, R. C. McMurtrie, Wm. M. Meredith. J. G. Johnson, Geo. W. Woodward, May 13, 1871. Geo. Junkin, Sept. 20, 1871.	THE LIBRARY COMPANY OF PHILADELPHIA *v.* HENRY J. WILLIAMS, ESQ.	Bill in Equity filed April 11, 1871.

May 22, 1871. Rule entered on defendant to plead answer or demur within thirty days, *sec. reg.*

July 6, 1871. Answer filed.

September 20, 1871. Rule entered on plaintiffs to reply or demur in thirty days, or decree *pro confesso.*

October 24, 1871. The plaintiff joins issue on the matters alleged in the answer.

And now, this 13th day of November, 1871, the court do appoint Richard S. Hunter, Esq., Examiner, to take and report testimony under the issues of fact raised in the above. *Per. Cur.* (order filed in E. D. Nov. 14, 1871).

June 22, 1872. Examiner's report filed.

And now, June 22, 1872, on motion of Messrs. Rawle and McMurtrie for complainants, the court appoint P. Pemberton Morris, Esq., as Master in the above case to report the

law, the facts, and a decree proper to be made thereon, *per cur.*

Nov. 9, 1872. Master's report with exceptions filed.

December 3, 4, 5, and 6, 1872. Argued, C. A. V.

December 31, 1872. The exceptions to the report of the Master are dismissed; the report of the Master confirmed, and decree accordingly.

Opinion by Mercur, J., filed.

January 3, 1873. Per order of defendant's counsel in writing filed, the above case is certified from the Court of Nisi Prius to the Supreme Court in banc.

II. *Abstract of Bill and Answer.*

This is partly given by the Master in his report, on pages 53, 54, 55, and 56. Some points there omitted are supplied in the following history of the case.

III. *History of the Case.*

Dr. James Rush, of the city of Philadelphia, died on the 26th day of May, 1869, seized and possessed of valuable real and personal property, inventoried and appraised at $1,110,717.

He disposed of this by his last will and codicils.(*a*) By the will dated 26th February, 1860, he devised and bequeathed his whole estate to his executor, Henry J. Williams, in trust, after distributing some articles of trifling value, and after paying certain annuities—aggregating about $8100—"to select and purchase a lot of ground not "less than one hundred and fifty feet square, situate be- "tween Fourth and Fifteenth and Spruce and Race Streets, "in the city of Philadelphia, and thereon to erect a fire- "proof building sufficiently large to accommodate and con- "tain all the books of the Library Company of Philadel-

(*a*) Page 15 of Master's Report.

"phia (whose library is now at the corner of Fifth and "Library Streets), and to provide for its future extension "according to plans, directions, and specifications which "I shall hereafter make or give; but if I should not make "or leave any such plans, directions, or specifications, "then to erect the same according to his best judgment "and to the views which I have expressed to him. It is "my wish that this building should be exceedingly sub- "stantial, completely fire-proof, without any large, lofty "or merely ornamental halls or lecture-rooms; the whole "interior to be divided in such a way as to contain the "greatest number of books, to be well lighted, and so ar- "ranged as to be of easy and convenient access.

"And upon this further trust, so soon as this build- "ing is completed and ready for occupation, then in trust "to convey the same, with the lot of ground whereon it is "erected, unto "The Library Company of Philadelphia" "aforesaid, and their successors, for the uses and purposes "of their library, and for no other use or purpose whatever. "*Provided*, however, that before any such conveyance shall "be made to the said Library Company, they shall, either "by an alteration in their charter, or in some other way "satisfactory to my executor, bind themselves and their "successors to conform to and comply with the following "express conditions, and any others I may hereafter im- "pose, under which they are to hold the said property and "all other bequests and devises herein or hereafter given "to them."

These conditions will be found in the will and codicils.(*b*) By a codicil, dated 18 April, 1867, he further provided:—

"I have in my will limited the extent of the lot to be "purchased for the library building, as well as its locality; "but as I desire that it shall have not only strength, dura- "bility, and accommodation, but also be of sufficient mag- "nitude for any future or contingent, but not an ambitious

(*b*) Pages 2, 3, and 4 of Answer.

"or competing, increase of the library; in order to prevent, "if possible, its being torn down in twenty years, and the "lot sold at a speculative profit to suit the hyperbole of the "times, I authorize and allow my executor, under a broad "and thoughtful foresight, to increase the size of the lot, "and select any situation he may deem most expedient, "without regard to any provision of my will or codicils."

By his first codicil he announced his desire that this building should be erected as a monument to his wife and her father.

"One of my objects in giving my residuary estate for "the use of the said Library Company was to express "my respect and regard for my father-in-law, the late "Jacob Ridgway, and my affection for and gratitude to his "daughter Phœbe Anne Rush, by erecting to their mem- "ories a monument which I hope will prove more du- "rable than any other grateful record I could make, and "be infinitely more useful in the community. As it was "from them I derived the greater part of my property, "which (under the special and prudent management of "faithful and trustworthy agents) has enabled me to devote "happily, and undisturbed, the latter part of my life to "pursuits of scientific inquiry, which I have designed to "be more beneficial than the more common enjoyment of "an ample fortune, it is both just and proper that I should "thus employ it, the more especially as Mrs. Rush had led "me to believe that if she had survived me, she would "have applied it to a similar purpose. Now, in order to "carry out this intention in a public and permanent form, "I direct my executor to have a marble slab, with the fol- "lowing inscription, on a plain ground, with a border of "simple moulding, without any surrounding ornaments, "placed and maintained on some appropriate part of one of "the interior rooms of the new library building, in which "my private library and other personal effects are to be pre- "served,

THE RIDGWAY BRANCH
OF THE
PHILADELPHIA LIBRARY.
A MONUMENT TO THE MEMORY OF
JACOB RIDGWAY
AND OF HIS DAUGHTER
MRS. PHŒBE ANNE RUSH."

He also provided, as he hoped, against unseemly litigation, by the following clause:—

"And I further will and direct that if any of the devi-
"sees or legatees or annuitants herein named shall attempt,
"themselves, or aid, assist, or encourage others to question,
"dispute, litigate, or object to the validity or effect of any
"part or portion of my will, or any codicil thereto, or of
"any gift or devise therein mentioned, then, and in that
"case, all the clauses in my said will or any codicil thereto
"conferring any benefit upon the person or persons afore-
"said shall stand and be revoked and annulled, and the
"same shall be paid and given over to the said Library
"Company."

From his relatives, whose natural claims were ignored, no word of complaint has ever been heard in the courts. All opposition has originated in the "House of his Friends."

Mr. Williams was the companion of Dr. Rush during the last days of his existence; had been his intimate friend for nearly half a century; was his kinsman and professional adviser, and possessed his entire confidence.

The Library Company of Philadelphia are a private corporation. If they decline to accept Dr. Rush's bequest, it will go to the erection and endowment of a PUBLIC LIBRARY.

They own a magnificent collection of rare and valuable books, aggregating upwards of 95,000 volumes. For

nearly twenty years, they had been using the most strenuous endeavors, by private and public appeals, to procure sufficient funds for the erection of a commodious, fire-proof building, for their safe-keeping. Though these appeals resulted in contributions to the extent of $16,722, and though the will of Joseph Fisher put them in the possession of an additional sum, they had never been able to gratify their ardent and long-cherished wish nor to quiet their anxious fears of the flames which might devour all their treasures before the collection of the needed residue—some $200,000 or $300,000.

Dr. Rush, who shared the pride of all Philadelphians in this literary treasure, determined to devote his large fortune to the erection of the building required for its preservation. In the truthful and well-chosen words of the bill:—(c)

"It is clear that the testator expected and designed that "the building he directed his executor to put up would be "used, if the Library Company were willing to accept the "conditions imposed upon them, *as a place of deposit of* "*their own books*, as well as those purchased with the "funds provided by him."

From the outset, Dr. Rush was anxious that a large lot should be procured, for in 1860 he directed that the one to be selected by Mr. Williams should be *not less than one hundred and fifty feet square.* As years rolled on, when he found that the building he contemplated would require a larger lot than he had at first supposed, and as he became more and more impressed with the necessity of procuring one of such dimensions as would allow of the extension that future growth might require, he became uneasy lest the dimensions originally mentioned would be insufficient, and therefore, in 1867, he authorized an *increase* in the size of the lot. The character of the building he has

(c) Bill, page 10.

suggested to his Executor, will require a lot with a front of at least 220 feet.(*d*)

The proper site for the building occupied his thoughts for many years. Even in his will, adequacy of dimension appears to be his chief anxiety—an anxiety that increased, as the Codicils show, with reflection. Centrality of location, unattainable without an outlay of some $350,000, though of course desirable, was incompatible with the gratification of this wish.

In his lifetime he directed his Executor, and Mr. Thomas Craven—the gentleman named in his will as Mr. Williams' successor—to make inquiries for a lot. They divided their duties, and Mr. Williams confined himself as nearly as possible within the limits originally named. The prices asked for lots within those limits, of sufficient size, were so extravagant that he could find none suitable. Mr. Craven, however, found one on Broad Street, 300 feet front and 540 feet deep, bounded by Broad, Thirteenth, Carpenter, and Christian Streets, purchasable for $130,000. Dr. Rush and Mr. Williams agreed as to its suitability, and it was immediately bought by the former, through the agency of the latter, for the purpose of locating thereon the Library building.

During the time that Mr. Williams was pursuing these inquiries, he was also acting with Mr. Henry Wharton and Colonel Alexander Biddle, as a committee of the Library Company, appointed "to make inquiry in regard to the purchase of a lot for the erection of a fire-proof building," at a special meeting of the Directors, who were "authorized to purchase a lot in the city of Philadelphia, on the best terms they can procure."(*e*) This committee had sufficient

(*d*) Answer, page 7.
(*e*) Examiner's Report, pages 111 and 112.

authority to bind the Company by an actual purchase.(*f*) These gentlemen, though most earnest in their efforts, were unsuccessful at that time in obtaining a lot of adequate dimensions, at a reasonable price. Mr. Wharton favored the purchase, at a high price, of a small lot on a side street —Locust Street—but Mr. Williams opposed it.

After purchasing the lot, Dr. Rush was desirous to ascertain, through Mr. Williams, whether the Library Company would accept it as the site of their building. He authorized him to communicate his testamentary intentions to those gentlemen who, as the committee appointed to select a site, were in a position to speak understandingly, and, we think, authoritatively. Mr. Williams(*g*) says:—I "desired Colonel Biddle to accompany me to Mr. Wharton's "office, and then stated to them that Dr. Rush had given "almost his whole fortune, amounting to a million of dol- "lars, to build a library at Broad and Christian Streets, and "asked them if they thought the Library Company would "object to that location. They declared that, considering "the magnificence of the gift, the Library Company ought "not, and they believed would not, make any objection to "his wishes as to its position. Dr. Rush, to whom I imme- "diately returned, was informed of the result of the inter- "view, was greatly pleased, and having obtained the views "of three members of the board, appeared entirely satisfied."

Mr. Wharton, though differing slightly in his recollection of this conversation, understanding, as he says, "that Mr. Williams spoke of Dr. Rush's intention to make this endowment in *prospective words*. * * * I may have mistaken Mr. Williams' words, but that was my understanding of them, and upon that, it is my distinct recollection, that in what was subsequently said by me I acted," admits:—

(*f*) "I then went to Mr. Gummey and said, that, subject to Mr. Williams' approval, we would purchase the lot." Mr. Wharton's testimony. Examiner's Report, page 20.

(*g*) Answer, page 5.

"Mr. Williams then asked me whether in my opinion "the Directors ought not to recommend the stockholders "to accept the gift of the lot under such circumstances. I "do not recollect that Mr. Williams mentioned any condi- "tions or qualifications about the endowment; indeed, I "am sure he did not. I then said that I did not think that "we, as a Committee of the Board, could bind the Board, "but that it was my individual opinion under these circum- "stances that the stockholders ought to accept rather than "the city of Philadelphia should lose so munificent a gift. "Mr. Williams then said that Dr. Rush had desired to get "the opinion of Directors on the point, but as that could "not then be done, he requested him to speak to the other "members of the Committee on Building."

Complainants admit that it has not been proven that the site is a bad one. The Master so reports, and the learned Judge at Nisi Prius so announces.

The Committee which represented the views of the majority of the stockholders at the meeting of the 21st October, 1869, reported:—

"The Committee did not enter into the consideration "whether the proposed site, situated as it is on the finest "avenue of Philadelphia, might not at an early future be "surrounded with the finest public and private structures, "and thus become most eligible."(*h*)

The selection is approved by the gentlemen—Messrs. Biddle and Craven—named as Mr. Williams's successors, in case of his death or resignation.

The objection to it, stated in the bill,(*i*) is that it "is not "*less than half a mile* south of the usual places of resort "of nearly all the stockholders," and that by reason of this immense distance, many of them will forfeit their shares of a stock which, after the announcement of the provisions of the will and of the intended site for the new building, sold in the market at an advance of about fifty

(*h*) Examiner's Report, page 137. (*i*) Bill, page 14.

per cent. If these apprehensions be well founded, the consequences cannot be *very* disastrous, for in place of the annual receipts from this source, which do not exceed $4981, an increase of some $24,000 in the annual income may be reasonably expected as the result of an acceptance of the provisions of the will.

No better site has ever been suggested, possessing the dimensions designated in the will, procurable at less than twice the cost of this lot.

In Mr. Wharton's cross-examination (*i*[1]) we find evidence that no one on behalf of complainants has been able to combine the conditions of reasonable price with adequacy of size and centrality of location.

"You are an active Director of the Library Company?
"I have been, and am."
"You have given the matter of location of the new Library "building great thought for years?"
"Yes, for several years; for a year or more before authority "was given to the Directors to purchase the lot."
"Will you now name one or more lots having more than two "of their sides 150 feet long, which in your opinion would be "suitable as a site for the erection of that building."
"I CANNOT, as the subject has been dismissed from my mind "as one of inquiry, for a considerable time."

A more expensive location would render impossible of execution the Testator's plans for a building, as is conclusively shown by the complainants' own arithmetic.(*j*) They allege that this building must cost $700,000, and that, allowing only $130,000 for the cost of the lot, there is but $689,515, with which to erect it.

One other objection, viz., that nothing is left for the purchase of books and library expenses—faintly whispered in the bill—is sought to be relieved by the prayer for a declaration by the Court(*k*) as to "how much of the *corpus* "of the estate shall or ought to be expended and employed "in the purchase of a convenient lot of ground and the

(*i*[1]) Examiner's Report, page 38.
(*j*) Bill, page 25.
(*k*) Bill, page 27.

"erection of a suitable building thereon." Though such a declaration would be in direct subversion of all the provisions of the will, it *might* give the desired relief.

Upon the decease of Dr. Rush, Mr. Williams consulted his then counsel, Judge Strong, as to his duties under the will. Since then, he has "taken no important step without "first obtaining the advice and approbation of counsel."(*l*) He was thoroughly impressed with the extent of the obligation imposed upon him by his oath of office as executor, and was advised that he must exercise his own judgment in the selection of a lot for the purposes of the library.(*m*)

Under this advice, with full knowledge of his duty, and with an honest intention to perform it, he selected the lot at Broad and Christian Streets as the site for the building. This action, and the reasons therefor, repeated in his testimony,(*n*) are stated in the answer,(*o*) as follows:--

I was advised by my counsel in writing on the 9th of July, 1869:—

"As executor you are guided by the written will. In the exercise of the discretion reposed in you by that instrument, you may regard Dr. Rush's views and wishes orally expressed, but, after all, *your* judgment, however it may be made up, must be your guide in matters left to your discretion."

In pursuance of this advice—for I have felt, and still feel, under the obligation of my oath of office, bound to perform my duty in accordance with the *law*—I considered, in all its bearings, without any bias, the matter of the site, but my conviction that it was the one by far the most expedient remained, and still remains, unchanged.

Though protesting that the complainants have no concern with or control over my reasons for this decision so long as they are honest, which is not, I believe, denied, yet, in deference to the Court, I will state some of those which influenced me at the outset, and govern me still.

The lot I have selected is bounded by Broad and Thirteenth, Christian and Carpenter Streets. It has a front on

(*l*) Answer, page 4. (*m*) Answer, page 6.
(*n*) Examiner's Report, pages 216–217.
(*o*) Answer, pages 7, 8, 9, and 10.

Broad Street of 299 feet 5 inches; a depth along Carpenter and Christian Streets of 527 feet, and contains about 3½ acres. It cost about $132,000. It was Dr. Rush's desire that I should erect a building upon a general plan which he described to me. It was to be of the Greek Doric order—to consist of a centre building with two wings—the former to have eight, and each of the latter four, columns in front. The details were left entirely to me. This plan, the architect, Mr. A. Hutton, tells me, will require, according to the drafts prepared by him and approved by me, a front of at least 220 feet. All efforts in other libraries to give sufficient light from the roof alone having signally failed, as I have learned from personal examination and correspondence, an additional space of 50 or 60 feet will be required to give side lights, so that a lot of from 260 to 275 feet is absolutely necessary, in my judgment, for the building I am required to construct.

The testator's "cardinal intent" was, that a building should be erected by me sufficiently large to accommodate for all time the books of the Philadelphia Library, such as would be an ornament to the city, and a lasting monument to his wife and her father. Broad Street, in my opinion, is infinitely preferable as a site for such a building, because of the handsome private and public structures already upon it, and of the probability of many more being erected there in the future; because of its length and centrality, and of its great width, which furnishes an opportunity for architectural display that our narrow streets fail to afford. In this preference my testator shared. A location of the library upon any other street in the city would be decidedly against my judgment.

From Vine to South Street it is almost entirely improved with buildings too costly to be paid for and then torn down. A prominent real estate agent whom I requested to obtain the prices of lots on this street, has furnished me a list of all the unimproved properties of any magnitude which he ascertained to be for sale, and the prices asked. By this it appears, that lots north of Vine Street from 150 to 200 feet in depth are held at about $500 per foot, those between Race and Arch from 180 to 260 feet in depth at from $900 to $1000 per foot, and those south of Locust Street of a depth of 130 feet at about $750 per foot; that the Asylum for the Deaf and Dumb at Pine Street, recommended as admirably suited for the library by some hostile to the site selected by me, which is but little more than one-third of a mile below, with a depth less by 130 feet than the latter, and a front of but 200 feet, is held at $275,000. All these lots, with the exception of the last, are quite narrow.

I am informed that the lot owned by the Pennsylvania Railroad, having a front on Market Street of about 250 feet,

and a depth on Thirteenth and Juniper Streets of about 353 feet, is held at from $300,000 to $350,000, and that for lots on Broad Street north of the Monument Cemetery with a depth of about 330 feet, $425 per foot have been offered and refused.

The lot on Locust Street, recently purchased by the complainants, containing one-sixth the area of the selected lot, cost, as I am informed and believe, $67,000.

I hope, under the estimates which have been furnished me, to finish the building with all its equipments, for $650,000; but I will not depend upon a smaller expenditure than $700,000. Though not admitting their correctness, saving for the purpose of the argument, I will accept the figures given by the complainants in the 25th page of their bill, by which it will appear, that if I expend, as I would be compelled, an additional amount of $140,000 in the purchase of a different site, I would have but $550,000 left, and if required to set apart for their use, as they seem to demand, an additional sum of $200,000 I could erect no fitting monument to the testator's wife and her father, and no building in accordance with my views or those which Dr. Rush has expressed to me. Neither the Company nor the Court can interfere with me in the selection of a site without cramping me in the matter of the building, over which I have a control that I believe has not been questioned.

The site which I have selected is within easy reach of all parts of the city. South of it is an immense population which is annually increasing, and, in the opinion of many—an opinion in which I join—this portion of Broad Street will ultimately be filled with magnificent residences. The facilities afforded by passenger railways are such, that to those north of it who may wish to use the library, a ride of a few squares additional will make no difference in cost and but little in time. The cars of the Tenth and Eleventh Streets line run within two squares, those of the Twelfth Street within one square, and those of the Thirteenth and Fifteenth Streets and Union lines along or around the lot. The latter also carry passengers without extra charge to the Navy Yard, Twenty-third Street, Fairmount, Richmond, and Kensington. It is equidistant with Buttonwood Street—in all less than four-fifths of a mile—from the street which is the very centre of the city, Chestnut Street, and below which a very large number of stockholders reside. It is nearer to Broad and Walnut Streets than is the present library building. It is but 930 yards south of the lot on Locust Street which complainants have recently bought, and distant from it, by car, five minutes, and by rapid walking, six minutes. The city through which the 900 stockholders are scattered is sixty miles in circumference.

The great size of this lot will always protect the library from the noise and bustle of the more crowded portions of the city,

and from all danger from fires or nuisances in its neighborhood.

Many of the libraries and museums of Europe are further removed than it is from the residences of those who use them. In this country, wherever the plan of building in the centre of population has been followed, it has been found in a few years, from its shifting so frequently, that they have become so disadvantageously located as to make removal a matter of constantly recurring agitation. The Astor Library in New York, a comparatively modern institution, is now many miles distant from the mass of the reading public, and the Boston Public Library has been compelled to establish a branch quite distant from the original location, from which an entire removal is proposed.

I have chosen this site for these, among other reasons:—

1. It is on the finest street of our city.
2. It is, so far as I know, the only lot on that street sufficiently large for the building I must erect, which I can obtain at a reasonable cost.
3. If compelled to purchase a lot elsewhere, I will not be able to erect the building ordered by the testator.
4. I know of no suitable lot on any other street which can be had at the same cost.
5. It is but little distant from the centre of the city, and is within easy reach, by car, of all portions of it.
6. It will not be necessary to have the library building torn down in twenty years, aud the lot sold because of its limited dimensions (Codicil, p. 25).
7. Its size insures for all time light, air, retirement, quiet, and safety from external dangers.
8. It already belongs to the estate.
9. It is exactly suited for the kind of library Dr. Rush proposed to endow—not a reading-room, nor one containing the light and ephemeral literature of the day, but one for readers and students of a higher grade.
10. It will carry out the cardinal intent of the testator as *he* understood it, because it is the one he selected himself.

The design of the present Bill is best shown(*p*) in the following prayers:—

"That it be referred to a Master, to inquire and report "what would be a proper and fit location for the said buil- "ding, to the end that the true intent and purpose of the "testator, as contained in his will, may be carried into full "effect."

(*p*) Bill, page 27.

"That the Court may from time to time give such fur-
"ther instructions, and make such further orders and de-
"crees in the administration of the trust, as to them shall
"seem fit; and especially that it may declare how much
"of the *corpus* of the estate shall or ought to be expended
"and employed in the purchase of a convenient lot of
"ground and the erection of a suitable building thereon."

"That the defendant may be restrained by injunction,
"preliminary until the hearing and perpetual thereafter,
"from proceeding to erect the said building on the said lot
"situate on the south-east corner of Broad and Christian
"Streets."

The assigned reason for demanding this extraordinary interference is, that after most anxious and careful inquiries for a suitable site had been made; after the merits and demerits of all available had been exhaustively discussed; after Mr. Williams had approved of the purchase of a lot for the purpose intended; after it had been bought and partly paid for by Dr. Rush; after the committee of the Library Company to select a site, with the knowledge that their opinion had been sought by Dr. Rush and was to be communicated to him, had said that they thought there would be no objection on the part of the intended beneficiaries, Mr. Williams promised the testator that he "would build the Library on that lot and nowhere else."

At the time this promise was given, Mr. Williams believed the lot in question was the best that could be procured. He so swears in his Answer (*q*) and in his testimony, (*r*) and he is confirmed by Mr. Wharton, who testifies, (*s*) that, *prior to the promise*, Mr. Williams told him, "*That there was a lot at the corner of Broad and Christian Streets suitable for the purposes of the Library.*"

It is admitted that Mr. Williams, since his appointment as executor, has striven to the very best of his ability to

(*q*) Answer, page 11.
(*r*) Examiner's Report, page 208.
(*s*) Examiner's Report, pages 21 and 33.

exercise his judgment, independently of his promise, in the selection of a lot, and that he believes he has done so. The learned Judge who heard the cause says: "He thinks "he exercised the power and discharged the trust under "the written will alone, wholly uninfluenced by his prom- "ise. The well known integrity and high moral character "of the defendant do not permit me to doubt that he him- "self thinks so." It is contended, by the Master, however:—

"It is impossible for any man, however cool and unim- "passsioned he may be, to know exactly how far his judg- "ment would be influenced by a promise so solemnly given "as that given by the respondent."

No one asserts that Mr. Williams has been actuated by improper motives, or that he has wasted or mismanaged the estate intrusted to him. A decree has been made, not that he be enjoined from building on the lot he has chosen, and that he shall select another, but that he be deprived of all right of selection, in favor of a Master, to be appointed by the court.

The Library Company, at whose instance this decree has been obtained, though possessing no legal right to accept anything under the will until after the completion of the building, ought to have shown that during the four years which have elapsed they have done every thing in their power to manifest their ultimate intention to do this frankly and without reservation; but, so far as they have acted at all, they have manifested an intention not to accept, unless the selection of a lot, the erection of a building, and the setting apart of a reserve fund shall all be in consonance with their views.

The non-acceptance of the bequest would render necessary a very great change in the building and plans to be adopted by Mr. Williams. He therefore desired an early expression of their views and opinions, that he might pro-

perly shape his course. Knowing that his days were numbered and that delay might prove fatal to the performance of his duty, he asked for this. Five months elapsed before he received it, and though it was then decided by a majority of 5 out of 597 votes to accept, it was also decided by a majority of 25, that no acknowledgment of appreciation should be expressed, for the confidence reposed in the company by Dr. Rush.(*t*) Threats were made of an appeal to the courts because of alleged improprieties in casting votes,(*u*) which allegations were not without foundation, for it was admitted by Mr. Smith, the librarian of the Company, that he voted one proxy for, which he had been instructed to vote against, acceptance.(*v*)

A course was subsequently adopted which had been disapproved of at the preliminary meeting. It was determined that the Company would accept the bequest of Dr. Rush, but that they would quietly evade its obligations, by erecting a building of their own in which they would put some or all of their books, and that as to such books and other property their entire and complete control should be reserved without regard to conditions.

There is no doubt that Dr. Rush designed the building, for whose erection he so munificently provided, as a receptacle for the Library books. This is admitted by the complainants.(*w*) Their directors long ago reported:—(*x*)

"We incline to the opinion that the spirit of the will "requires that the books belonging to the Philadelphia "Library Company should be removed to the new build- "ing; and that the testator did not contemplate the ex- "istence of several library buildings, in different parts of "the city, in which the books of the library might be "distributed at the discretion of the Company. It is not "inconsistent with this view that the testator designates

(*t*) Examiner's Report, page 140.
(*u*) Examiner's Report, p. 27.
(*v*) Examiner's Report, page 19.
(*w*) Bill, page 10.
(*x*) Examiner's Report, page 193*c*.

"the building to be erected and all his property devised and "bequeathed for the use of the Philadelphia Library, and "the books purchased with the proceeds thereof, as 'The "Ridgway Branch of the Philadelphia Library.'"

At the stockholders' meeting a resolution had been presented in these words:—

"No. 5. *Resolved*, That the acceptance of the stockholders "of the Library Company of Philadelphia, is upon the ex- "press provision that so much of the present collection of "books and other property of the Company as may by the "Directors be deemed expedient, shall be retained in the "present or some other central position for general use and "circulation."

The committee of stockholders whose main recommendations were then indorsed by the majority, counseled the rejection of this resolution, because, as they alleged—

"If adopted, it *amounts to a rejection of the legacy*, and "was, it seems, so intended."

Subsequently, and before the filing of the bill, the complainants purchased a lot on Locust Street, for the erection of a library building, and, when they applied for such legislation as was necessary under Dr. Rush's will, they refused to accept any which would oblige them to use his library building as a place of deposit for their own books. The act of Assembly which was framed by them and passed at their instance, expressly enacts that their acceptance shall be "in such manner that *the real and personal property of* "*the Company, including such books*, pictures, statues, and "other works of literature and art as now are, or hereafter "shall be, held by them in their own right, or in any other "of [or] different trusts, *shall be in no wise affected thereby*, "*but shall remain and be under their own entire and exclusive* "*control and disposition.*"

The evidence as to the promise, on which the bill is

based, is to be found in the letter from Mr. Williams to Dr. Willing, bearing date 30th Dec., 1870.(*y*)

It was written under these circumstances. Mr. Williams had selected the site in accordance with his own judgment. He had so announced, repeatedly. Whenever questioned, he had asserted, most decidedly, that in his opinion, it was the best for the purpose. The Library Company were fully aware of all this, and of the fact of Dr. Rush's desire for the erection of the building thereon. No one had ever suggested a better, feasible site. The Company, as we have seen, despite their first vote, had reconsidered their original resolution, and had decided upon a course in direct violation of the testator's design and intention as understood by themselves.

After all this, and after the whole matter had been exhausted and exhaustingly discussed, without suggesting any reasons why his own judgment should be set aside and that of the Directors should be substituted, Mr. Williams was advised by them, on the 12th Dec., 1870—nearly nineteen months after Dr. Rush's decease—of the passage of the following preamble and resolutions:—

"*Whereas*, At a meeting of the members of the Library "Company held on the 29th day of June, 1869, Mr. Williams, "as Executor of Dr. Rush, expressed an intention of erecting "the Library Building contemplated by the provisions of the "said will on the square of ground on the corner of Broad and "Christian Streets in this city."

"*Now further Resolved*, That it is the opinion of the Direc- "tors of this Company that the removal of their collection of "books to the site thus proposed would, under the circum- "stances, be destructive of the interests of the Library and "contrary to the wishes of a vast majority of the Stock- "holders."

"*Resolved*, That the Directors take this, as the first oppor- "tunity since the Company has been authorized by law to "accept the trusts of Dr. Rush's will, to express to Mr. Wil- "liams their earnest hope and request that he will reconsider "his said intention of building on the site named."

"*Resolved*, That Dr. Willing, Judge Hare, and Mr. Lea be

(*y*) Bill, page 17. Answer, page 29.

"appointed a committee to communicate these resolutions to "Mr. Williams and to confer with him on the subject.

"*It was further Resolved*, That the counsel of the Company "be consulted with regard to the present rights and duties of "the Library Company of Philadelphia as Trustees for the "Ridgway Branch of the Library."

In reply to this he wrote. After informing the Committee of the fact of his promise to Dr. Rush, he asked them whether it would be consistent with truth and honesty for him VOLUNTARILY, in opposition to the wishes of the testator and to 'HIS OWN DELIBERATE JUDGMENT,' to violate a pledge given under circumstances, which rendered it as sacred as an oath, for the reasons assigned, viz., "to gratify the wishes of the shareholders," who had refused to pass a resolution expressing their gratitude for Dr. Rush's gift. He balanced the respective weight of the wishes of ungrateful beneficiaries and of a munificent testator, and he argued that he had no right to turn the scales in favor of the former, voluntarily, in opposition to his own judgment, and to a solemn promise to the latter. He nowhere intimated that his promise would induce him to violate his duty as Executor, but merely that it would be dishonorable for him to violate his promise in *opposition* to such duty. He concluded by giving the reasons why, in his judgment, the lot selected was the one best adapted to the purposes intended.

The evidence in proof of the exercise by Mr. Williams, of his own judgment, uninfluenced by his promise, is found in the following extracts:—

Mr. Williams says, on page 20 of his answer:—

"I do insist, as charged in the 30th paragraph, that I have "selected the said site in the exercise of my *own* discretion, "unbiased by any promise; and I deny that any promise, how-"ever it may be felt to be morally binding, did prevent or can "prevent my exercising, or knowing that I have exercised, my "judgment. I aver, that I am now able to say what line of "conduct I would have followed if I had never made a promise, "and that I would have selected the site at Broad and Chris-"tian Streets, if Dr. Rush had been silent as to his wishes."

On the 6th August, 1869, Mr. Williams wrote to Mr. Fraley, Chairman of a Sub-Committee of Stockholders, page 128 of Examiner's Report, as follows:—

"With regard to the site of the building, I thought I had, "on more than one occasion, expressed myself with sufficient "clearness, but I will again repeat that it is my intention to "place it on the square at the corner of Broad and Christian "Streets. I deem that situation most expedient under all the "circumstances of the case, for I consider its distance from the "centre of the city as far outweighed by its other advantages, "and I have the consolation of knowing that this decision is "in entire accordance with the wishes of the testator who se- "lected and purchased this lot for this very purpose in his "lifetime. It is his money that I am to spend, and I do not "find in his will anything authorizing me to be governed by the "opinions of other persons in opposition to his judgment as "well as to my own. I should think in so doing I was vio- "lating the trust he has reposed in me. I therefore answer "your first and second questions, decidedly in the negative."

The Committee of managing stockholders, reported, as to the site, prior to 21st October, 1869, page 137 of Examiner's Report:—

"But the executor of Dr. Rush, both from the expressed "wishes of the testator during his life, *as well as from his* "*own judgment of the suitableness of the selected site*, is indis- "posed to change it."

On pp. 202, 203, 208, and 209, of the Examiner's Report, we find this testimony of Mr. Williams:—

"Q. Since Dr. Rush's death, has any member of the Li- "brary Company directed your attention to any lot as suita- "ble for the Library Building, other than one of the lots "examined by you prior to his decease?

"A. No, sir. Mr. Fraley mentioned several lots on which "he thought a library might be placed, but every one had "been examined by me, reported to Dr. Rush, and rejected by "him, either on the ground of size or of price.

"Q. Was there not some lot rejected by Dr. Rush which "you yourself approved of?

"A. I think not. When I said approved of, I meant with "reference to Dr. Rush's will. I knew what he had required "me to consider, and except the Deaf and Dumb lot, Mr. "Dundas's, the Pennsylvania Railroad lot, and Gen. Patter-

"son's, they were all too small, and of all these the prices "were too high in my opinion.

"Q. Since Dr. Rush's decease, have you examined as to "whether there are any available lots suitable, in your opinion, "for the Library Building, other than those examined before "his decease?

"A. I have examined none, because I know of no others. "I have heard of no lot, which I consider suitable for the "Library, *as* suitable as the lot at Broad and Christian.

"Q. In your answer you have given the prices of various "lots in the city of Philadelphia. State when and how you "ascertained those prices.

"A. As to all lots, the prices of which are given on page 8 "of my Answer, saving as to those north of Monument "Cemetery, I learned the prices of almost all of these from "Mr. Pratt, a prominent real estate agent. The price of the "burnt depot I learned from Mr. Gowen.

"Q. Was the question as to your duty under Dr. Rush's "will with regard to the selection of a site submitted by you "to counsel?

"A. I am sure it was; I am certain Judge Strong gave me "an opinion upon it; the opinion was dated July 9, 1869, and "was in these words:—

"'As executor you are guided by the written will. In the "exercise of the discretion reposed in you by that instrument, "you may regard Dr. Rush's views and wishes orally expressed; "but after all *your* judgment, however it may be made up, "must be your guide in matters left to your discretion. You "will remember that Mr. Meredith and Mr. McMurtrie sug- "gested the Court might control your discretion, if it is "*fettered* by any oral promise or verbal direction. The sugges- "tion I think uncalled for and unfounded, but it is best to "avoid unnecessary reference to oral instructions given by the "testator.'

"Q. In pursuance to this advice, as to your duty to act "upon your own discretion, unfettered by promises, in select- "ing a site for the Library building, did you consider the "question of such selection in accordance with your judg- "ment, irrespective of your promise, and if so, with what "result?

"A. I did; after Dr. Rush's death, I was obliged, of course, "in order to assume the duties of executor, to take the "ordinary oath, which obliged me to carry out the directions "of the will. This was a legal as well as a moral obligation; "and under it I did then, and have done ever since, considered "the question as to the site of the Library entirely irrespective "of any promise made to Dr. Rush, or of any wish expressed "by him, and I became then and have continued ever since

"convinced, according to the best judgment I am able to form, "that this lot posesses advantages which are attainable in no "other *with* which I am acquainted.

"Q. Is not this judgment influenced by your promise?

"(Objected to as leading.)

"A. Not that I am conscious of at all. I believe that if I "had made no promise and had not known the wishes of Dr. "Rush, my judgment would have been the same.

"Q. Had your judgment been different, would you not have "felt obliged under your promise, which in the Bill is alleged "to have been spoken of by you as 'binding as an oath,' to "have chosen the Broad and Christian Streets site notwith- "standing?

"(Objected to as leading.)

"A. No, sir. If my promise to Dr. Rush and my oath as "Executor had been at all in conflict, I would have resigned "my Executorship at once and left some other person to put "up the building."

On page 53 of the Examiner's Report, Mr. Whitman, the Secretary of the Library Company, testifies, under cross-examination:—

"Q. Have you heard at any of the meetings either of stock- "holders or Directors, expressions of opinion by Mr. Williams "as to the propriety of the site at Broad and Christian Streets "for the erection of a library building?

"A. I have.

"Q. State what those expressions were, or their substance.

"A. They were to the effect, that the lot was a large and "eligible one, that he thought it would be as easy for the "stockholders, or for a large majority of them, who would "have to ride, as he thought, when they visited the Library, to "go to Broad and Christian as it would to go to Broad and "Walnut, or to any place that had been suggested as a cen- "tral and convenient location for the Library. I remember "his speaking of the several railroads, the Union, and the 13th "and 15th, by which stockholders could reach the Library "from any part of the city. He also said that this Library "was to be built for all time, and that it might be in future "as central as any location talked of. He gave various other "reasons of that nature.

"Q. Did you ever hear him express the slightest doubt as "to the propriety of the site?

"A. I don't recollect that I have.

"Q. Were not such expressions of opinion made at or about "the time he spoke of his promise to Dr. Rush?

"A. I don't recollect whether the remark concerning the

"ease of reaching it by railroad, and the probable future cen-
"trality of the location, were made at the same time when he
"spoke of the other. I heard them at several times.

"Q. Between what periods of time were any statements
"made by him on either of these points?

"A. Between the annunciation to the Library of the gift
"by the will, and the last meeting of the stockholders."

On pages 59, 60, and 63 of the Examiner's Report, we find this testimony by Mr. Fraley, one of the stockholders, and a witness for complainants:—

"My proposition was agreed to, and a Committee consisting
"of Judge King, Mr. Longstreth, and myself, was appointed.
"The Committee met, organized, and requested me to confer
"with Mr. Williams. I made an appointment with him for such
"a conference, met him, and went pretty fully over all the mat-
"ters connected with the bequest, expressed to him strongly
"the belief I had that unless the site were changed the share-
"holders would not agree to accept the legacy, and then
"directed his attention to several other sites that I supposed
"would be more favorable for the Library, and stated that if
"any one of them were selected, all opposition would be
"quieted. Mr. Williams replied that those lots had all been
"examined, that the prices at which they were held were so
"high as to prevent the acceptance of any of them by Dr.
"Rush, and that the Broad and Christian Street lot had been
"selected because, both in the judgment of Dr. Rush and of
"himself, it combined all the advantages that he wished to
"secure. I then proposed to Mr. Williams that he should
"reconsider the matter, and that I felt sure if he would
"adopt a different site, the cost of which should be more than
"the price of the Broad and Christian Street lot, that then,
"from my intercourse with the shareholders, I believed they
"would make up the difference in the price of the lots, or any
"loss that might be sustained by the sale of the Broad and
"Christian Street property. Mr. Williams, however, firmly
"declined to entertain any such proposition. He repeated to
"me in still stronger terms than he had used at the meeting,
"how fully he felt bound by his promise to Dr. Rush, and
"that, as in his own judgment the Broad and Christian Street
"lot was the best site in all respects for the Library, he
"should place it there, unless he were prevented by the order
"of some court of competent jurisdiction."

IV. *Opinion of the Court Below.*

MERCUR, J.

This case comes before me upon exceptions to the report of a Master. He was directed to report the law, the facts, and a decree proper to be made therein. Twenty-two exceptions have been filed to his report. The very able arguments of counsel, however, have not been directed to each exception separately, but rather to the discussion of two questions, which may be stated to be covered by these, to wit:—

First. What powers were vested in the defendant under the trust created by the will of Dr. James Rush in regard to the location and purpose of the library building?

Secondly. Has he properly executed those powers in selecting the lot at Broad and Christian Streets as the site for said library building?

The first question can be more satisfactorily answered by referring at some length to different portions of the will.

The testator, by his will of the 26th of February, 1860, devised and bequeathed the whole of his real and personal estate to his brother-in-law, Henry J. Williams, his heirs and assigns, in trust, to pay certain legacies, annuities, gifts, and bequests, to be thereafter expressed in codicils, and then to hold the residue and remainder of his estate "in trust, to select and purchase a lot of ground, not less than one hundred and fifty feet square, situate between Fourth and Fifteenth and Spruce and Race Streets, in the city of Philadelphia, and thereon to erect a fire-proof building, sufficiently large to accommodate and contain all the books of the Library Company of Philadelphia." And upon the further trust, "so soon as this building is completed and ready for occupation, then in trust to convey the same, with the lot of ground whereon it is erected, unto 'The Library Company of Philadelphia' aforesaid,

and their successors, for the uses and purposes of their library, and for no other use or purpose whatever." Providing, however, before such conveyance should be made to the said Library Company, they should, either by an alteration in their charter or in some other way satisfactory to his executor, bind themselves and their successors to conform to, and comply with, certain express conditions therein specified. One of the conditions was "that all the accounts of the receipts and expenditures from the estates aforesaid, real and personal, shall be kept separate and distinct from all other accounts of the said Library Company, and shall all be headed and kept as the accounts of 'The Ridgway Branch of the Library Company of Philadelphia.'"

He also appointed said Williams executor of said will.

By a "first codicil" thereto, dated the 16th of May, 1866, he imposed additional restrictions upon said Library Company, and designated the beneficiaries of the legacies, annuities, and gifts indicated in his original will.

In his "additional codicil" of the 18th of April, 1867, he says, "I authorize and allow my executor, under a broad and thoughtful foresight, to increase the size of the lot and select any situation he may deem most expedient, without regard to any provision of my will or codicils."

On the 18th of January, 1869, Dr. Rush purchased by contract a lot at Broad and Christian Streets in the city of Philadelphia, for the avowed purpose of having the Library building erected thereon, and made a payment of $1000 upon the contract. He held this lot subject to the payment of the residue of the purchase money at the time of his death. That occurred on the 26th of May, 1869. The defendant has selected this lot as the site for the library building. Had he the power in equity so to do? He says, he had: that the will left it to his sole judgment and discretion, and not to the judgment and discretion of anybody else; and in the exercise of that judgment and discretion he has made the selection. Superadded to the power given

him in the will he points to the purchase of this identical lot by the testator, after the execution of his will, with the express object of having the library building located thereon, and claims that was an ademption *pro tanto*.

I, however, am of the opinion that the doctrine of ademption or double portion cannot be applied to the facts in this case. The defendant must fall back upon the will, and rely upon that alone, for his authority. By that instrument he was authorized to select any lot which commended itself to his own free, unbiased judgment as most suitable. If no improper influences were operating upon his mind and warping his judgment in the exercise of his discretion, and he acted in good faith, a court of equity will not interfere with that discretion; Hill on Trustees, 489; Gochenauer vs. Froelich, 8 Watts, 18; Chew vs. Chew, 4 Casey, 17; Pulpress et al. vs. Af. M. E. Church, 12 Wright, 204. But discretionary powers like other authorities must be exercised in the manner prescribed by the trust instrument. Hill on Trustees, 488.

To the defendant was given by this instrument the power to select any lot which "under a broad and thoughtful foresight" commended itself to his judgment. The selection must be made under and by the exercise of the defendant's judgment entirely free from any obligation imposed upon it by the testator other than those contained in the will and codicils. Such a discretion the defendant must bring to the discharge of his trust, and then it only marks the limits of the power given to him. The exercise of such a discretion the claimants have a right to demand. They can require no more, and may not submit to any less.

Secondly. Did the defendant properly use his own discretion, and execute the power intrusted to him in the selection of the lot in question? The complainants aver that this site will be prejudicial to the interests of the library, utterly destructive of the trusts which they have hitherto administered, and which they claim it was the manifest design of the testator to promote. They further allege that

the defendant assumed the trust under such a trammelled and crippled discretion that he was thereby disabled from using his natural unbiassed judgment in the selection of the lot. The Master concurred in this, and in his very able report has found "that the trustee, by his promise to the testator, had so crippled his discretion as to make it impossible to say how much his preference for the lot in question is due to his unbiassed opinion that it is most expedient for the purpose, and how much to his promise to Dr. Rush," and that the action of the defendant should be subjected to the control of the court.

This presents the controlling question in the case. Do the facts and the law justify the Master in his conclusions?

The evidence shows that some weeks before the death of the testator he became very anxious to have the location of the intended library building fixed and settled; and he desired the defendant to ascertain the size and cost of all the vacant lots on Broad Street (upon which street he desired it to be placed). The defendant procured statements of the sizes and prices of all he thought suitable, from Vine to South Street; but Dr. Rush was not satisfied with any of them. Some other gentlemen brought him a plan of the lot on Christian Street, and he was so much pleased with it that he directed the defendant to buy it at once. The defendant did so, by the aforesaid contract of May 18th, 1869. The Doctor thereupon expressed great pleasure that it was concluded, as it relieved his mind from all anxiety. "Some days after," says the defendant (in his letter of the 30th December, 1870, to Dr. Charles Willing, chairman of a committee appointed by the complainants), "the Doctor recurred again to this subject, as it had probably occurred to him that he had given me an absolute discretion as to the situation of the library by the terms of his will, and that I might be induced to overrule his decision after he was gone. He called me to his bedside and asked me to give him a promise that I would build the library on that lot, and nowhere else. I gave him this promise as fully and

solemnly as language could express it, and he then thanked me, and said he could now die in peace."

In his testimony taken before the Examiner on the 17th of April, 1872, he says: "I think it was about the second day after the interview with Mr. Wharton (which he had just stated was on the 20th or 21st of May, 1869), when I was seated by Dr. Rush's bedside. I think the lot had been the subject of conversation between us, when the Doctor turned to me and said, 'Harry, now you will promise me to put the building upon that lot?' I said, 'Certainly, Doctor, if you desire it; I will promise you that I will put it there, and nowhere else.' The Doctor merely expressed his satisfaction. I think he said, as near as I can recollect, 'Well, I am very glad of it; it is now all settled.'"

The Doctor died within five or six days thereafter. This promise, then, was demanded and given a very few days prior to his death. It was two years after the last codicil to his will had been executed. It was demanded of a brother-in-law to whom he was about to intrust more than a million of dollars—I say about to intrust, for there was yet time for him to revoke the will and all of its trusts. He was unwilling to pass all his vast estate into the hands of the defendant upon the implied assurance that the library building would be located upon the lot which he had purchased for its site. Hence he made the specific demand. What his action would have been, had the defendant's answer not been in accord with his judgment, is left to conjecture. He suffered his will to remain unchanged. He passed from this earth, there is every reason to believe, in an abiding faith that he had restrained the free choice of the defendant, and that he had secured the erection of the library building upon the lot designated by himself.

What was the position of the defendant? He knew that he had been named in the testator's will as his trustee and executor. Sitting by the bedside of his dying friend and brother—recognizing the Doctor's right to control his own

property—wishing to relieve his mind from all doubt upon the subject that troubled him, the defendant then and there promised, as fully and as solemnly as language could express it, to put the building on that lot and nowhere else. Do not all the attendant and surrounding circumstances impress the mind of every conscientious and reflecting person with the very strong moral obligation thereby imposed upon the defendant? I can scarcely conceive one stronger. The greater the integrity, the higher the moral sense, the stronger would be the obligation upon the conscience. That the defendant possesses both in a high degree is manifest in his letter of the 30th December before referred to. When asked, in behalf of the claimants, to reconsider his intention of building on said lot, and locate the building elsewhere, his answer was such as did credit alike to his conscience and to his heart. After repeating the promise which he had made, and the circumstances under which it was made, he says:—"Now, do you think it would be at all consistent with truth and honesty for me voluntarily to violate a pledge given under circumstances which render it as sacred as an oath, and made to a dying man who had confided to me the whole of his estate? Would you, with your well-known delicacy and sensibility to all honorable engagements, feel yourself justified in doing so were the case your own, and should I not lose your respect and regard (which I value very highly) were I to hesitate for a moment as to what was my duty?"

Therein and thereby he proves the indelible stamp made upon his mind. Conscience, resting under an obligation strong as an oath, bound him to the observance of his promise. With that deep recognition of moral obligation resting upon his conscience, he assumed the duties of the trust. He thinks he executed the power and discharged the trust under the written will alone, wholly uninfluenced by his promise.

The well-known integrity and the high moral character

of the defendant do not permit me to doubt that he honestly thinks so. If, however, he be correct, there must have been a time when his conscience was absolved from this deep moral obligation—a time when he threw it off, and when the lawful one took exclusive possession of his judgment. I understand the answer to be that it was at the time he was obligated to take the usual oath in order to assume the duties of executor. This was on the 31st of May, 1869. This latter oath, he says, created a legal as well as a moral obligation. Did it, however, wholly eradicate the moral obligation, "sacred as an oath," under which he had rested up to that time? In his letter of 30th December, 1870, he refers to it as still resting strongly upon him, and that his duty required him to be influenced thereby.

It is contended, however, inasmuch as the defendant has sworn in his answer, and again before the examiner, that he has considered and decided the question as to the site of the library building entirely irrespective of and uninfluenced by any promise made by him to Dr. Rush, that the complainants have failed to make a case in which a court of equity will interfere with the discretion which he has exercised.

In considering the act which the defendant has committed, or is about to commit, we must look at the position of the donor, the donee, and of the beneficiaries of the power. The beneficiaries have the right to require the power to be executed according to the terms of the written instrument creating it. If the donor induced the donee to accept the trust under a pledge that he would execute it otherwise than was provided in the instrument, he committed, in equity, a fraud upon the power. If the donee accepted it under such pledge and so executed it, he committed a fraud upon the power. It is not necessarily a moral fraud. A wilful departure from the terms of the power is a fraud upon it, without regard to whether the motive thereto was good or bad. Topham *v.* the Duke of Portland, 1 De Gex. Jones

& Smith, 571. Nor does it change the rule of law in regard to the agreement to pervert the trust from the original purpose for which the power was intended, whether that influence be exerted before the appointment or after it, provided that in both cases it secures the consent of the appointee to fulfil the wishes of the appointer. Topham *v.* Portland, 31 Beavan's Reports, 539, 540.

No American authority has been found which covers the case under consideration, but in Topham *v.* The Duke of Portland, reported in 5 Chan. Appeal Cases, 40, it is held that although the donor and the donee both swore that the power was not executed to carry out any agreement between them, other than those specified in the written instrument, yet that a chancellor might look beyond the oaths and see whether the presence of a moral obligation did not at the date of the appointment, and when the trustee came to act, weigh upon her mind with such force as to make her a passive instrument of the donor's intentions.

A judge or juror is forbidden to sit in a case wherein a party litigant is closely related to him by blood or marriage. He will not be permitted to purge himself of his disqualification by answering that he can, and will act wholly uninfluenced by such relationship.

Certain facts, which the wisdom of ages has recognized as influencing the judgment of mankind generally, create a conclusion of law that they will influence the judgment of each individual.

Applying the law and reasons to this case, testing the uncontradicted evidence by all those principles which I have ever been taught to believe influence the human mind, and control the actions of men, it does establish such a state of facts as would naturally and reasonably restrain and trammel the free judgment of the donee of a power. Such a general presumption cannot be removed by the honest opinion of a donee that in his particular case he is not influenced thereby. Hence I am unable to conclude

that the defendant had, when he made the selection of the lot in question, or has now, such a free discretion and unbiassed judgment as the complainants are entitled to invoke and a court of equity bound to provide. It should therefore be referred to a master to inquire and report what will be the most expedient location for said library building, without my indicating any opinion as to whether or not the lot at Broad and Christian Streets is a suitable one.

The exceptions to the report are dismissed, the report of the master is confirmed, and decree accordingly.

see 18 87 of pamphlet 4

Decree.

And now, this 31st day of December, A. D. 1872, this cause came on to be heard upon bill, answer, replication, and proofs, and was argued by counsel; Whereupon, in consideration thereof, the Court are of opinion and so declare, First, that the complainants are competent to, and of right may, when the proper time shall arrive, assume the trust confided to them by the will of the testator, Dr. James Rush; Secondly, that all the powers to that end conferred on the defendent by the will of the said testator are trusts, in which the complainants have an interest in the nature of property, and which are to be administered by the defendant only in the manner in which all trusts can, or of right ought to be administered; And it appearing to the court, as well by the written admissions of the defendant as by his answer and testimony in this cause, that at and before the time when the said trust vested in him, he had absolutely bound the discretion intended to be given to him by the said will as to the selection of a site for the building proposed by the testator to be erected, and was and is thereby disqualified from, and incapable of exercising the power and trust in that behalf given to him by the said will, and that, in order to carry out the true intent and meaning thereof, the said trust may, and should be now exercised under the supervision of this Court according to

the course and practice of chancery;—it is, therefore, ordered and decreed that it be referred to

Esq., as master, to inquire and report what would be the most expedient situation for the said building, to the end that the true intent and purpose of the testator, as contained in his will, may be carried into full effect; And that he have authority to take testimony in addition to that taken before the examiner; And that the defendant be restrained, until further order, from proceeding to erect the said building on the lot situate at the southeast corner of Broad and Christian Streets; And the Court reserves all questions of costs and expenses for its further consideration.

V. *Assignments of Error.*

1. The court erred in granting an injunction against the erection of a building on the lot described in the bill.
2. The court erred in granting the prayer of the bill.
3. The court erred in decreeing in favor of complainant.
4. The court erred in refusing to dismiss the bill.

VI. *Argument.*

It is conceded by the complainants that the executor, who has selected a site which will in the deliberate judgment of the donor of the power, best promote its objects, has honestly endeavored, since his appointment, to do his duty under the will, and that he believes he has done this. There is no allegation of any fraudulent or improper conduct, nor does any one breathe a suspicion as to the honesty of his motives. It is claimed, however, that a pro-

mise given before any duty devolved upon him, to the only person who had a right to object, rendered it impossible for him thereafter to exercise any judgment, although the exigency against which the promise was meant to guard —the ascertainment of a lot more suitable—has never arisen. In view of this claim we do not care to discuss the questions to which the Master's report is principally devoted, such as whether or not the complainants are a *charity*, or whether they have done what was necessary to put them in a position to pray for relief. A very cursory examination has shown that they have sedulously avoided committing themselves to any decided acceptance of the legacy, and that they have inserted in the act of Assembly which they drafted, a proviso, that will render it impossible for them ever to accept it, in good faith. Though their *legal* rights be not dependent upon their establishing their *status* as a charity, still, in one aspect of the case, such *status* is not without importance, as their refusal to comply with the conditions imposed will lead to the establishment of a library which will be a great public charity.

Behind such minor questions, looms through the darkness out of which it arose, the shadow of a doctrine, so monstrous in its proportions, that everything else will be left unnoticed, in the effort to secure for it the judicial condemnation it so richly deserves. This doctrine, stated above, we will examine from several points of view, and by the light of certain propositions which we hope to maintain.

First. The nature and design of the power conferred upon Mr. Williams will be briefly considered.

Second. The decree can only be sustained by maintaining the three propositions following, all of which, we submit, are indefensible.

1. That Mr. Williams acted under his promise and not in pursuance of his power, and that it is impossible for

him to know that he exercises his judgment in his selection of the site, or to testify as to the reasons which led him to his conclusions.

2. That his promise, once made, so affected his mental faculties, that it was impossible for him thereafter, though advised it was his legal duty to select a site—a duty he desired to perform—to possess or exercise any judgment as to the matter.

3. That, though, from the time the power vested—advised as to his duty and anxious to perform it—he did everything he could to exercise, uninfluenced by his promise, the best judgment he possessed, and though he selected a site which he honestly believed to be most suitable for the purposes contemplated by the will, yet the Library Company are entitled to demand of him the possession and exercise of a better discretion, and to insist upon his removal because of its absence.

Third. Equity will only interfere with the exercise of a power where there is *mala-fides*, either in refusing to act at all, or in acting with an intention or purpose to accomplish some object or end, not contemplated by the power. There is no precedent for interference in a case like the present.

Fourth. The proper remedy, if it had been proven that Mr. Williams, though honestly believing he was exercising his own judgment, had selected an improper site because he was insensibly influenced by his promise, would have been, to enjoin him from building thereon, and to order him to select another. The decree which prohibits him from making choice not alone of that site, but of all others, is without precedent.

Fifth. The objections, moral and legal, against the interference prayed for, are infinitely stronger than any reasons which have been, or can be, advanced in its favor.

I.

As to the nature and design of the power.

The original power prescribed no restriction upon the selection. The executor was ordered to select, but his choice was not confined to such a lot as "he deemed expedient." If Dr. Rush had spoken of a particular lot as one most suitable for the Library, Mr. Williams would have been entitled to select it; for, within the territory designated, any one might have been chosen possessing the requisite size.

The supplemental power was given, not to *restrict*, but to *enlarge*, that originally given. In the will, dimensions were mentioned and the area of selection was limited; but, in the interval, Dr. Rush had found that the plan he contemplated would require a larger lot than he had supposed. He had also seen more and more destruction through overgrowth, and he had become exceedingly anxious lest a lot should be chosen, so small, that in the future it might be found necessary to tear down the building which would have been erected at so great outlay. To guard against this, and for this reason only, he *withdrew* the restriction as to locality, having doubtless found that a lot sufficiently large, within the original limits, could not be obtained for a reasonable price.

Prior to this *he* had not deemed it expedient to select a lot outside these bounds, but now, under a broad and thoughtful foresight as to the danger of tearing down and re-sale, which he apprehended, he authorized his Executor to increase the size of the lot, and to select any situation. The words "he may deem most expedient," were used to

render more marked the withdrawal of the restriction as to locality which the *testator* had theretofore deemed expedient.

The main desire was to secure a lot possessing ADEQUATE DIMENSIONS, in order to guard against the danger of demolition, of which Dr. Rush manifested such an almost morbid fear. Centrality had once been made a condition; but, finding it only obtainable at a risk he deemed too great, Dr. Rush withdrew the restrictions by which it would have been insured. When the Executor found that a lot sufficiently large could not be obtained within the old limits, he availed himself of the privilege thus given him.

At best, "expediency" is prescribed as the reason for selection. This is defined as "propriety under the peculiar circumstances of the case." A perusal of his will shows that Dr. Rush had peculiar ideas as to the uses and purposes of a library. He did not wish to endow one of those lounging, chess-playing, novel-circulating libraries of the day, which must be established in the midst of the peculiar community to which they cater. With a full knowledge of what would best effectuate the end of his will, he deliberately purchased the lot in question. Though it is not necessary for the purposes of this case, we might well contend, that as the one who best knew what was wanted, deemed it most suitable, Mr. Williams might also select it as "most proper under the peculiar circumstances of the case."

In Hitch *v.* Leworthy, 2 Hare 207, there was a "devise "and bequest of freehold, copyhold, and personal estate, "upon trust for sale at the discretion of the trustee, and "that the rents, interest, and proceeds should be divided "amongst a class, either equally or in other proportions as "the trustees, having regard to their circumstances, should "appoint; followed by an unattested codicil, directing the "application of such rents, interest, and proceeds for the "benefit of such of the class as were unmarried or unset-"tled, and particularly for the comfortable support of P. "(one of the class), who was of weak mind." In appoint-

ing, the trustee followed the directions of this unattested codicil. It was held by Vice-Chancellor Wigram: "It "was argued that the codicil operated only with respect to "the copyhold estates and the personalty. This argument "is founded on a proposition which, in theory, is no doubt "true, and, for some purposes, is true in practice, but it is "not so for all purposes. The will in this case gives "Leworthy powers large enough to do much that he has "absolutely directed to be done during the life or con- "tinued incapacity of the lunatic, and the codicil certainly "does not restrain it. Admitting that the powers given "by the codicil would not authorize Leworthy to do some "matters as to freehold which he might as to copyhold, "*there is no reason why he should not, in the honest exer-* "*cise of the discretionary powers given under the will,* "*have regard to the known wishes of the testatrix, whether* "*those wishes were obligatory or not.* Her wishes, commu- "nicated in conversation, would not be obligatory, but "there is no reason why he should not attend to them in "the exercise of his discretionary powers; and if he might, "for that purpose, have regard to conversation not having "any testamentary force, I do not see why he may not "regard mere wishes, notwithstanding he derives his "knowledge of them from the language of the codicil."

Expediency is different as looked at with the mental sight of different men. Dr. Rush knew this and prescribed the eyes through which it should be seen. He did not direct Mr. Williams to select the best lot; but to choose the one which HE should deem most expedient.

It has been decreed that such a lot shall be chosen as some appointee of the court shall select, though it may be one which the chosen trustee would utterly condemn.

II.

The propositions which must be maintained in order to maintain the decree.

1. Did Mr. Williams act under his promise and not in pursuance of his power?

Complainants in their bill assert the affirmative. Unless they prove it they have no right to relief. Have they done so? They point to the letter of 30 December, 1870, as proof. In that letter Mr. Williams communicates the fact that he did make a promise; but asserts, in the most decided manner, that he selected the lot because, in HIS JUDGMENT, it was most expedient. He does not say that his promise influenced his selection; but simply that having made the selection, because, in his judgment, it was best, he could not voluntarily build elsewhere, on a lot not so good, in violation of his promise to build there and nowhere else. If this case is to be determined, like every other, upon the evidence, it fails for want of proof. Of this there is none. All the evidence is opposed to the allegations of the bill. The witnesses of complainants, Messrs. Whitman and Fraley, testify that from the outset, at least eighteen months before his letter was written, and repeatedly afterwards, Mr. Williams said what in it he asserted—that the lot he had chosen was the most suitable for the purposes of the will. It cannot be claimed that he was then seeking to make evidence for himself; for had this been his design he would have been silent altogether. Mr. Williams swears to his belief in most unequivocal language, and he gives the reasons which induced it. He also swears that with all the lots before him, of which afterwards he knew when it became necessary to make his selection under the will, he had come to this conclusion before any promise was given. In

this Mr. Wharton corroborates him. The answer is as potent as two oaths, but against it there is not even one.

No unfavorable inference can be drawn from the coincidence in the selection of the same lot by Mr. Williams and by Dr. Rush, for the available lots are exceedingly few, and the one preferred was not chosen in the first instance until after the most thorough investigation.

Complainants, well aware of the meagerness of their facts, claim that this is an exceptional case, and that conviction must here result by a species of spontaneous generation. They are entitled to no relief unless Mr. Williams is disqualified by reason of his action having been under his promise. They prove the promise by a letter in which he mentions it, but asserts that he is not acting under it, and then ask the court to say that the promise itself raises a conclusive presumption that he is acting under it. When their attention was first directed to the subject, they entertained different, and as we think, more correct views of the law. They then only claimed(z) "the question in "such cases is, always, whether the devisee considers him- "self morally or conscientiously bound to carry out the "wishes of the testator privately expressed, or as being "perfectly free to exercise his own private judgment in the "disposition of the property. In the opinion of your Com- "mittee, Mr. Williams would probably be held to stand in "such a position, and on a bill filed by any one in interest, "could be required to answer whether the selection of this "location was made according to the best of his own per- "sonal judgment as to what was best for the institution, "regardless of any promise to or request by the testator. "The result of such an inquiry hereafter instituted might "indeed be very disastrous. For, if Mr. Williams, having "acted on this secret trust, and confessing himself to have "done so, should select this lot and erect the Library Build- "ing on it, the heirs of Dr. Rush might claim that the gift

(z) Examiner's Report, p. 193(e.)

"was void in whole or in part, and assert a forfeiture under "the provisions of the act."

We admit that Mr. Williams will not, until judicially prevented, erect the building on any other lot than the one he has selected, and that he promised he would not; but we assert that it never became necessary for him to act under this promise because he never heard of a more suitable site. If he had, then, under the advice he had received that it was his legal duty as Executor to carry out the will irrespective of such promise, he would have resigned, and thus could have kept his promise inviolate without any breach of a duty morally as obligatory on him and legally more so, by reason of its being based upon an actual oath administered by the Register of Wills. Mr. Williams never promised not to exercise his judgment, and he never said that he felt an obligation upon him *not* to do so. All he promised was, that though his judgment should prove adverse to the lot selected in Dr. Rush's lifetime, still he would build on it and not elsewhere. As no conflict of judgment arose, the promise amounted to nothing.

Complainants admit that Mr. Williams believes he has exercised his own judgment; but say that it is impossible for him to testify as to the motives which influenced him in the selection of a site. The Master seems to regard as pertinent, the case of Clark *v.* Van Reimsdyk, 9 Cranch 153, in which it was held impossible for one man to swear, as of his own knowledge, to the motives which influenced another, upwards of 7000 miles away; but the complainants themselves never quoted this, and we cannot see its application.

No decided case has ever held that it is impossible for a man to say why he came to a particular conclusion. It has ever been thought, that if truthful, the party himself must necessarily be the best witness as to the reasons of his conduct. The selection of a site for a building does not involve such complicated mental operations that it is im-

possible to trace them. Mr. Williams has traced them and has sworn to the result.

If he can be believed, the bill fails through disproof of its allegations. The burden of showing that he cannot be believed, is upon the complainants. They content themselves with asserting a metaphysical proposition in opposition to every-day experience, without any citation of legal authority to support them. It is with the *purpose* only that the Court can concern itself. Mr. Williams can certainly testify as to whether he did or did not act with the *intention* of selecting the best site.

2. Did the making of a promise as to the place on which he would build, render it imposible for Mr. Williams thereafter to determine as to the expediency of a site?

The affirmative is on the complainants, and we might wait until it was established before proving the negative.

Mr. Williams has testified to the advice as to his duty, given to him by his counsel, and has sworn that he endeavored to perform it, and that he did perform it. If, in the exercise of his judgment, a different site had been selected, would this have been nugatory by reason of disqualification to act? If not, can we logically hold that the disqualification exists because his judgment has induced the same selection which was made in the testator's lifetime. If it be *possible* to shake off the influence, we must believe the uncontradicted testimony that it actually was shaken off. If it be not, then the promise rendered it impossible for Mr. Williams to select any lot, even with the approval of complainants. It would be difficult to establish the influence of a promise to decide in favor of the expediency of a particular site, on a subsequent opinion that such site was really most expedient, but it is impossible to trace any connection between such an opinion and a promise to build on such a site whether it shall be found to be expedient or not. The promise may bind the *conscience*, but the opinion results

from the exercise of judgment, whose workings are independent.

Mr. Williams, knowing that it is his duty to act under the will, says that if his opinions were adverse to his promise he would resign; but that he can conscientiously act without any violation of duty or promise.

In the every-day practice of our criminal courts, in their examination as to the qualifications of jurors in murder trials, the question of the extent of the influence upon the judgment, of conscientious scruples, is held to be for the jurors themselves.

In Commonwealth *v.* Knapp, 9 Pick. 496, "Mr. Green "stated in reply to the inquiry in regard to his opinions "upon finding a verdict in a case punishable with death, "that he was opposed to capital punishment, but that he "did not think that his opinions would interfere with his "doing his duty as a juror. The Chief Justice, after con- "ferring with the other judges, intimated to him that the "state of his opinion was a matter which he must decide "for himself; that as he had stated it, the court did not "consider him disqualified. Mr. Green, after some hesi- "tation, took the oath. When he was called to take his "seat he stated to the court that he thought it inconsistent "for him to serve as a juror, holding the opinions he did, "and should prefer being let off. The Chief Justice re- "marked, that it was a question to decide whether his "opinions would prevent his giving an unbiased verdict. "Mr. Green replied that he thought he could give an "unbiased judgment, yet he had a sympathy for the pri- "soner and his family, and feared that his opinions in "relation to capital punishment might influence others of "the jury. The court, upon conference, ruled that his "case did not come within the statute, and he was not "excused."

"When, notwithstanding his having conscientious scru- "ples against capital punishment, a juror thought he could "do justice between the State and the accused, he was held

"competent." Williams *v.* State, 33 Miss. 389; People *v.* Stewart, 7 Cal. 140.

In Hanway's Trial, 2 Wall. Jr. 143, it was held that "it "did not constitute incompetency for a person to say that "he had formed a conditional, but not an absolute, opinion "on the law of treason, *e. g.* who says he cannot under- "stand how treason can be committed against the United "States if such and such facts do not constitute it, if he "says that, on being instructed by the court that the "opinion is erroneous, such opinion will cease to influence "him as a juror."

It has been said that the disqualification of judges and jurors furnishes an analogy; but the reasons for their disqualification are inapplicable here.

The permanency of our institutions depends, not only upon the preservation of jurors from actual taint, but from the *suspicion* of it. No harm can result from the rejection of any particular man as a juror, because the whole community affords a sufficient field for the selection of another, and therefore, without actually determining whether certain matters do or do not influence him, he is excluded.

"It did not escape the discernment of our legislature that a principle, requisite to secure a due administration of justice and fair and impartial trials, was, to have jurors who were impartial, and entirely free from all kinds of bias, *or the suspicion* thereof; that, like Cæsar's wife, *they ought not only to be pure, but unsuspected.*" Chess *v.* Chess, 1 Penna. 43.

It is not his conviction of his inability to correctly decide a point of law, which induces a judge who may happen to hold a share of stock in a corporation litigant, to withdraw from the bench when its causes are decided, but it is his desire to keep the administration of justice free from all suspicion.

Here, however, Mr. Williams possesses rights and is intrusted with duties which no one else can perform. We cannot condemn him upon mere suspicion, but must *demonstrate* the actual existence of the taint.

If the parties to litigation waive their objection to a juror interested in the cause, no one else can complain, and the verdict will be valid. Dr. Rush, who alone was interested when he selected Mr. Williams, waived all objections on the ground of bias, and the complainants, whose rights, if any they have, subsequently attached, are not entitled to an impartial juror, though such be the common law right of contestants in a court of justice. Yet they demand the *blank* mind which in a neighboring state has brought such discredit upon the whole system of trial by jury.

With a juror the formation and expression of an opinion would disqualify. Would such an expression prior to Dr. Rush's death afford ground now for a motion to dismiss Mr. Williams from his executorship? No judge feels himself disqualified from sitting in review of cases decided by himself though sharing man's usual unwillingness to be proven in the wrong. As a juror could not do this, it is apparent that many objections are founded on arbitrary common law exemptions, not upon experience of fact.

Interest disqualifies a juror, not because of his inability to form a correct opinion, but through the fear that he will, in futherance of his own private ends, give a verdict *contrary* to his judgment. Can we fear that a man, so sensible as Mr. Williams has shown himself, to the obligations of conscience, would, in violation of his sworn duty, though his judgment pointed to one site, disregard it for another? The same conscience which impresses upon him the obligation of a mere promise, would enforce upon him the still more solemn obligation of his oath.

3. Were the Library Company entitled to any better judgment than that possessed by the executor at the time it became necessary for him to exercise it?

We have already said that the measure of expediency

prescribed by Dr. Rush was not absolute, but relative—such only as the donee of the power should establish. It is not alleged that the latter has refused to exercise his judgment, but simply that its quality is not good.

We submit that the discretion to which they were entitled was that only which was possessed by Mr. Williams when action became necessary; and that if, with the full knowledge and approval of Dr. Rush, it had indeed become biased in the latter's lifetime, still their rights were derivable only through its exercise. It was his own property which the testator devised, and he was entitled to a free choice of agents for its management. The complainants had no right to demand of him the selection of an unwarped executor; for he could entertain, and, *at his own expense*, gratify, the most absurd prejudices.

Though Mr. Williams had been the owner of a large property in the neighborhood of Broad and Christian Streets, and had repeatedly expressed to Dr. Rush the most decided opinions as to its advantages, his appointment would not be open to impeachment. Those only who have no real merits in their defence, object to jurors with opinions; but, in ordinary life, men are chosen to perform high and responsible duties because they are known to entertain them, and to be likely to be influenced by them.

Wills are frequently prepared long before the death of those by whom they are made, and the chosen agents for their execution sometimes lack, at the time of the probate, the active intellectual ability which once characterized them; but no right to letters testamentary has ever been challenged for such cause. Testators may know, and yet be willing to incur, the risk, for, though they may see the ravages of time, they may prefer to risk their fortunes in the wreck of what was built well, with sound-hearted oak, rather than in the newest craft of ill-seasoned timber.

No harm can result, for men are sufficiently alive to their own interests, to change their agents, when the depreciation has reached a point at which the wreck has be-

come rotten. The person nominated as executor, is the man as he shall chance to be, with all his prejudices and imperfections, when the time for him to assume his office arrives.

If the will be not altered, we may presume that a testator, acquainted with the fact of a diminution of mental force or quality, was willing to waive all objections on that score.

The will, in regard to the person designated—his faculties and characteristics—speaks as of the time of the testator's decease. It is hardly necessary to argue a proposition so elementary, which is to be found in all the text books. The Master so reports on page 73. "A will speaks "from the death of the testator, and not from its date, un- "less its language, by fair construction, indicates the con- "trary intention." Canfield *vs.* Bostwick, 21 Conn. 550. The beneficiaries can demand nothing more than the honest exercise of such faculties.

We may more than doubt whether an executor, whose judgment, without the testator's knowledge had become warped, could be removed from his office; but if a testator, specially notified of the fact, refused to revoke the appointment, no court would listen patiently to a demand for his removal for that cause.

The courts have gone so far in sustaining such nominations, though the rights of *creditors*, for whom the testator was not entitled to speak, were involved, that only because of their unwillingness to presume that the testator's failure to revoke was deliberate and in view of the fact, have they appointed receivers, where long after the making of the will the executors had become bankrupts. Here, however, as the bias resulted from the testator's own act, he must certainly, against his own beneficiaries, be presumed to have intentionally and deliberately retained his executor.

"The Spiritual court cannot refuse to grant probate of a "will to a person appointed executor on account of his "poverty or insolvency." "The consequence is, the court

"of chancery assumed a new jurisdiction, and that court "will now restrain an insolvent or bankrupt executor, "and appoint a receiver. But if a person, known by the "testator to be a bankrupt or insolvent, be appointed an "executor by him, such person cannot, on the ground of "insolvency alone, be controlled by the appointment of a "Receiver." 1 Williams on Executors, 205, 206.

"The question simply is, whether it is fit the court should "now interfere for the protection of the property. *Its in-*"*terference can prejudice no right.* I must consider bank-"ruptcy as evidence of insolvency, and from the will being "made long before the Commission, though not altered "afterwards, I cannot satisfactorily infer that this testator "*had a deliberate intention* to entrust the arrangement of his "estate to an insolvent executor. I think it proper a re-"ceiver should be appointed." Langley *v.* Hawke, 5 Madd. 45.

In our own case of Sill *v.* McKnight, 7 W. & S. 244, it was held that a person found by an inquisition to be a habitual drunkard, was not thereby deprived of his power to perform the office of executor.

In Berry *v.* Hamilton, 12 B. Monr. 192, we find these emphatic declarations in favor of testamentary right: "Besides, to allow an inquisition of that sort would be to "deny to men a privilege which, for centuries, has been held "to be most sacred and dear, that of freely disposing of "their own property to whom they please, and of appoint-"ing trustees of their own choice to manage and control "it when they are no more, and whatever may be the "opinions of men as to the propriety or impropriety of a "particular appointment, the very basis and foundation of "the exercise of the right which society has granted to "its members, to appoint their representatives after their "death, is the special confidence reposed by the testator in "the appointee. And men, it seems to us, would care but "little for the high privilege of disposing of their estates "to their liking, if they are to be denied the right of se-

"lecting those who are to carry out and effectuate the be-
"nevolent purposes of their wills."

"Where a marriage is required to be by consent of
"trustees, and the trustees withhold consent for a corrupt
"motive, the Court of Chancery may interfere. And it
"has been contended, that, if the person whose consent
"is required is interested in refusing it, he must show a
"reason for his dissent. *If, however, the creator of a trust*
"*chooses to require the consent of a person whom he knows at*
"*the time to have an interest in refusing it, it is difficult to*
"*conceive an equity for interfering with his choice. And at*
"*all events no equity will arise if the trustee has meant to act*
"*honestly, though his decision may not be the one at which the*
"*court would have arrived.*" Adams on Equity, § 186.

Mr. Williams's promise has been likened to one given by a juror, to find a verdict in favor of a particular party; but the analogy is wanting. Such a promise by a juror would demonstrate his utter unfitness for the position. It would be corrupt and vicious, and of course should disqualify him. Had Mr. Williams, after the duty had vested and the rights of the beneficiaries had attached, made a promise not to perform it, he would have exposed himself to a grave suspicion of corruptness of motive. We cannot agree with the complainants in their argument that a promise to a stranger would have been no more objectionable than the one given to the testator. Mr. Williams would have known that no stranger could have rightly exacted such a promise, and could never have given it from proper motives. There would have been a taint of dishonesty which would have rendered all his subsequent acts suspicious.

In giving the promise he did, was Mr. Williams guilty of the commission of a crime and of one of such heinous nature that deprivation alone can be an adequate punishment? The learned judge at Nisi Prius refers to the cir-

cumstances under which it was made, in words which negative the idea that he deemed it a crime.

"He gave it," says he, "sitting by the bedside of his "dying friend and brother, recognizing the doctor's right "to control his own property, wishing to relieve his mind "from all doubt upon the subject that troubled him. His "promise was demanded of a brother-in-law to whom he "was about to entrust more than a million of dollars. I "say, about to entrust, for there was as yet time for him to "revoke the will and all of its trusts. He was unwilling "to pass all his vast estate into the hands of the defendant "upon the implied assurance that the Library building "would be located upon the lot which he had purchased "for its site."

Mr. Williams' promise was given to one who had a right to exact it. At the time, he did not know that the Doctor would not render it legally binding, by a revocation of his will. When it was made, no one had a right to object. It was not then wrong to give it. As Doctor Rush's death rendered it impossible for him to render the promise obligatory in law, he, Mr. Williams, recognizes the legal consequences of the failure, and asserts that he has not acted in pursuance of his promise, and that he would not, under the advice given as to his having no right to do so, but that he would rather resign than violate his duty by keeping it.

Mr. Williams gave the promise understandingly, not with a view to commit a fraud upon the power to select the most suitable site, but because he then believed that he could best execute it, by building on the lot selected, which, in his opinion, was the "most expedient." His judgment in its favor has been deliberately formed, after most anxious inquiry. It accorded with that of Dr. Rush, and he then believed that the beneficiaries, who had been previously consulted, were agreed.

By such a promise, so given, he can hardly have subjected himself to legal penalties.

III.

Equity will only interfere with the exercise of a power, where there is *mala-fides*, either in refusing to act at all, or in acting, with an intention to accomplish some object or end not contemplated by the power. There is no precedent for interference in a case like the present.

The extreme Chancery jurisdiction—relic of the old days of priestly arrogance and assumption—inconsistent with that full exercise of individual right allowed in Republican countries, has not with us, in its extravagant pretensions, been favored to the extent to which it has been countenanced in England. The savor of arbitrary, tyrannical interference, is not relished here. We have rejected, in the most decided manner, all such monstrous doctrines as the *cy pres*, and that of illusory appointments. If, then, as an offshoot of these condemned assumptions of authority, complainants could point out, in the English chancery books, a doctrine similar to that advanced by them, they would still be challenged to show the propriety of its being engrafted into our jurisprudence; but they have searched in vain, from the time when à Becket domineered over all private right, to the present day, for a precedent in point.

At the risk of wearying by repetition, we will extract from the reports and text-books, the grounds of equitable interference with discretionary powers.

"If the Legislature has intrusted the exercise of a power "to the sole judgment and discretion of a particular body "of individuals, no court is authorized to interfere with or "control that discretion, provided it is exercised in good "faith." Walker vs. Devereaux, 4 Paige 251.

"If a matter is left to the discretion of any individual or "body of men who are to decide according to their own "consciences and judgment, it would be absurd to say that "any other tribunal is to inquire into the grounds and rea- "sons on which they have decided, and whether they have "exercised their discretion properly." Tenterden in King vs. Mayor, 3 Barn. and Ad. 271.

"With the exercise of the Commissioners' judgment over the subject-matter confided to them, and within the scope of their authority, this court has nothing to do; so long as they act in good faith, and with pure and upright motives, I am not at liberty to interfere against their positive denial." Clarke *v.* Brooklyn Bank, 1 Edwd. Ch. 361. The Commissioners were authorized to distribute stock amongst such subscribers as they should deem most advantageous to the institution, and though they distributed it amongst themselves, they were not enjoined.

"I suppose the court thought itself at liberty to examine "whether the refusal proceeded from a vicious, corrupt, or "unreasonable cause. *A dangerous power*, which, however, "has always been assumed by the court." Lord Eldon in Clarke *v.* Parker, 19 Vesey 1.

In Bruner *v.* Storm, 1 Sandf. Ch. 358, where the necessity of a sale was to be left to the judgment of the executor, it was held that this could not be controlled if it was exercised in good faith.

In Re Beloved Wilkes, 3 Mac. & Gor. 441, where trustees were to appoint such a boy to a foundation out of one of four named parishes, as might be deemed eligible, they decided that there was no boy therein who was eligible and selected one who resided elsewhere. There had been a *cy pres* settlement in chancery which allowed them to select outside the prescribed limits under such circumstances. It was held that in the absence of proof that the trustees had exercised their discretion other than fairly and honestly, the court had no jurisdiction to interfere. "Discretion "must be exercised with an absence of indirect motives,

"with honesty of intention, and with a fair consideration of "the subject, and the duty of the court generally is, to see "that the discretion of the trustees had been thus exercised, "and not to deal with the correctness of the conclusions at "which they have arrived."

In our case we have proven the existence of all the above elements of a good execution of the power. It is admitted that Mr. Williams did consider the subject, that his motives were honest, and that his design was to exercise his judgment with a view to arriving at a correct conclusion. He denies that his intention was the fulfilment of his promise in violation of his duty. Complainants allege, however, that though the motive was right, the execution was imperfect by reason of the judgment being bad in quality.

"The amount to be allowed a *cestui que trust* was to be "determined by the trustees at their discretion; and if such "determination was made in good faith, and according to "the best judgment of the trustees, it is not subject to the "revision of this court." Hawes *v.* Hawes, 5 Cush. 454.

"Where trustees, with a discretion, act fairly and not "corruptly or partially, a court of justice would do too "much to control their acts." Lord Hardwicke in Att'y-Gen'l *v.* Harrow, 2 Vesey, 551.

In Keckewich *v.* Marker, 3 Mac. and Gor. 311, it was held that the court would protect the trustees "in the ex- "ercise of their power, there being an absence of all *mala* "*fides*, or of any wanton or unreasonable exercise of their "discretion." See cases collected in *note.*

"A corporation, as an individual, with such a power "over an estate devoted to charitable purposes, would, in "this court, be compelled to exercise that power, not "according to the discretion of this court, but not cor- "ruptly." Dummer *v.* Corporation, 14 Vesey, 252.

The courts may compel school directors to perform their duties, or restrain them when they transcend their powers; but they cannot interfere where they exercise their unques-

tionable powers unwisely. Wharton *v.* School Directors, 6 Wright, 358; S. P. Heard *v.* Directors, 9 Wright, 93.

"Unless the executors act in bad faith in the exercise of discretionary powers given to them by will, a court of equity will not control them." Chew *v.* Chew, 4 Casey, 17.

In Pulpress *v.* The Church, 12 Wr. 210, trustees were ordered to use the income of an estate for propagating the gospel amongst the colored people of two cities. On the principle that charity begins at home, they appropriated it to the support of their own pastor. Judge Strong, in delivering the opinion of the court, said:—

"It is a discretion which the complainants cannot con-
"trol, nor ought a court of equity to interfere with it, so
"long as it is honestly exercised. That would be to substi-
"tute the discretion of the court for that of those whose
"discretion was made the rule of application by the founder
"of the charity and to make the substitution without rea-
"son. It would destroy the trust rather than enforce it.
"The discretion to which the fund was committed may not
"have been most judiciously exercised, but it is not one of
"the conditions upon which the trustees hold that there
"shall be no mistake in judgment. If there were a posi-
"tive transgression, or if the fund were continuously ap-
"plied in such a manner as to lead to the conviction that
"the selfishness of the trustees rather than the design of the
"founder of the property had become the rule of appro-
"priation, or if it were manifest that their honest discre-
"tion was not exercised, it might become the duty of the
"court to interfere."

It was in view of all that had been decided by the court of which he had been so illustrious a member, that Judge Strong advised Mr. Williams:—(*a*)

"A court of equity does not interfere with a discretion
"reposed, except in cases of clear abuse, where the court

(*a*) Examiner's Report, page 117.

"can conclude that the donee of a power is acting in fraud "of it. But when, as in your case, the trustee acts in ac- "cordance with his own best judgment, and in so doing "follows the positive directions of the testator, it will be "altogether unprecedented for a court to interfere and "substitute its discretion for that invoked by the will."

Where, in Re Gresham Life Ins. Co., 21 Weekly Reporter, 188, it was alleged that a corporation had improperly refused to approve of transfers of shares, the Vice-Chancellor refused to interfere, saying: "Although I per- "fectly agree that if it can be shown affirmatively that "they are exercising their power capriciously and wantonly, "then there might be good ground for the court to inter- "fere."

"Unless it can be shown that the trustee, having the "discretion, exercises the trust corruptly or improperly, or "in a manner which is for the purpose, not of carrying "into effect the trust, but of defeating the purpose of the "trust, the court will not control or interfere with the ex- "ercise of the discretion." Wellesley *v.* Mornington, 2 Kay and Johns. 154.

"Where a power is given to trustees to do or not to do "a particular thing, at their discretion, the court have no "jurisdiction to lay a command or prohibition upon the "trustees as to the exercise of that discretion, provided "their conduct be *bonâ fide*, and their determination is not "influenced by improper motives." Lewin on Trusts (5th ed.), 439.

"And in such cases the court cannot decide upon the "propriety or impropriety of the refusal by the trustees "to give their assent, unless the refusal be shown to pro- "ceed from a vicious, corrupt, or unreasonable cause. And "it will rest with the other party to prove the existence of "an improper motive, and not with the trustees to show "a reason for their refusal." Hill on Trustees, 490.

"If the trustees exercise their discretionary powers in "good faith, and without fraud or collusion, the court can-

"not revise or control their discretion. The trustee can-
"not, however, exercise his discretion for any fraudu-
"lent, selfish, or improper purpose, nor can he refuse to
"exercise a discretionary power for such purpose; and if
"he acts or refuses to act upon such grounds, the court
"will interfere and give a remedy to the parties injured
"by the fraudulent act or refusal to act." Perry on Trusts, § 511.

This brings us to the discussion of a case, much relied on by the complainants, but which does not sustain their right to the relief they have prayed. On the contrary, it establishes principles utterly at variance with those which are necessary for them to maintain. We refer to the case of Topham *v.* Duke of Portland, reported in 31 Beavan 525; 1 De Gex, Jones & Smale, 517; 11 H. L. Cases, 32; 5 Chancery Appeal Cases, 40. We will analyze it, in order to show:—

Its facts.
The principles of law it decided.
Its want of similarity to our case.

As to the facts.

The old Duke of Portland conveyed certain property by deed of trust to his son, the present Duke, and authorized him to appoint it between two of his daughters, Harriet and Mary, or to appoint it to one in exclusion of the other, and subject to such restrictions as the donee of the power might think fit. Before this, it had come to the knowledge of the Duke that his youngest daughter, Lady Mary, had entertained proposals of marriage from Col. Topham. He did not think fit to approve of the match, and strongly expressed his opinion, threatening that he would, so far as he had the power, leave away everything from her. She promised not to marry in his lifetime. Nothing appears to have been said by the late Duke, before the creation of the power, as to the manner of its exercise. No previous

promise was given. The bill charged (5 Ch. Ap. 45), "After the execution of the deed the late Duke communicated to his children his intention that in the event of the plaintiff marrying Sir Wm. Topham the said income and annuity should be appointed, by the Duke of Portland for the time being, in such way as that one moiety should be received by Lady Harriet for her own benefit, and that the other moiety should be dealt with for the benefit of the plaintiff according to circumstances. The late Duke's children acceded to the wish so expressed, and agreed with him to carry into effect his intentions in reference thereto." It was also charged that the last appointment "was not made for the benefit of Lady Harriet, but for the purpose of carrying into effect an agreement that she had made with the donee, not to use more than one moiety, but to accumulate the other, in pursuance of which said appointments had been made, and that the donee executed the deeds, well knowing that Lady Harriet would act in conformity with such agreement."

After the late Duke's death, a marriage took place between Lady Mary and Col. Topham. The donee of the power then attempted to execute it, and appointed the whole fund nominally in favor of Lady Harriet, but only after he had communicated his father's wishes and subject to an arrangement that she should only use one moiety, and should reserve the other for her sister's benefit under certain contingencies. This moiety of the fund was carried to a separate account on the banker's books under the head "S," meaning sister, under a cotemporaneous order given by Lady Harriet, who was well aware that she was not to use it, and assented to the arrangement.

The power was really exercised only as to one moiety of the fund. In the House of Lords it was so held, but they introduced into their order the words "without prejudice to any question as to any future exercise of the power of appointment." The Duke, after all the litigation through three Chancery Courts, determined to try a new experiment

and again appointed the whole fund to Lady Harriet; but a moiety of the dividends was still retained in a separate account. The donee then swore that these deeds were executed for the sole benefit of Lady Harriet herself; that they were not made in pursuance of any agreement with her as was alleged, and that he had no expectation as to the manner in which she would use that fund. In cross-examination, as Lord Hatherley said, Lady Harriet admitted that she was still but a passive instrument to effect her brother's purpose, and there was no evidence to show that she had ever been released from that position, or that she considered herself so released.

The principles decided, the italics being our own, were as follows:—

A power to be validly executed must be executed without any indirect object. The donee of the power must "give the property "which is the subject of it, as property, to the person to whom he "affects to give it." Where it is otherwise given, it "is in equity "a fraudulent execution of the power, and the deed of appoint- "ment was wholly void." In H. L. Cas. 32, Lord St. Leonards said:—"*The parties have shown that it was not a real trans- "action, as such appointments must be in order to be valid*, but "that it was a transaction founded upon an intention to give "one-half absolutely and no more to Lady Harriet, and to make "her the instrument of tying up the other half for Lady Mary "so that they might give it to her or not, just as they thought "proper, afterwards," page 58.

"We were much pressed in the course of the argument, with "the danger and inconveniences that might be attendant upon "examining into the motives by which the donees of the power "may have been influenced in the exercise of them, and agree "that there would be both danger and inconvenience in such "examination, but it is one thing to examine into the purpose "with which an act is done, and another thing to examine into "the motives which led to this purpose. *What we have to do "in this case is to look to the purpose of the act which was done "and not to the motive which led to it. There is the same inten- "tion to put the appointed power under a control not authorized "by the power, that of Lady Harriet, the same accession on "her part to the purpose, the same resort to a mere contrivance "to effect its object, and the same absence of bona-fides.*" L. J. Turner, in 1 De. G. F. & J. 563.

"The evidence satisfies me that Lady Harriet Bentinck was not intended by the present Duke of Portland to take benefi-

"cially, the whole of what one of the four deeds purported to "appoint in her favor beneficially, and that *the main and govern-* "*ing view which he had in executing them was to enable the in-* "*come at least, of part of the property, to be appointed, em-* "*ployed, or withheld in a manner not warranted by either of* "*these powers.*" L. J. Bruce in same volume.

"It has been pressed upon me, more especially by the counsel "for the Duke, that I cannot decide in favor of the plaintiff "without holding, either, first, that the appointments already "made in favor of Lady Harriet, being tainted with illegality "by reason of the circumstances under which, and the purposes "for which they were made, it was impossible for the Duke to "make fresh appointments in her favor free from the same taint "of illegality; or, secondly, that I must discredit the state- "ments made by the Duke's answer and affidavit.

"I do not find myself under any obligation to accept either "alternative. As to the first, *without saying that it is impossi-* "*ble to set what was wrong right, and to make any subsequent* "*appointment free from the taint, I hold that it was necessary,* "*in order to set it right, that something should have been done* "*and said, clearly, unambiguously, and sufficiently, to discon-* "*nect the new appointment from the old understanding—from* "*the old purpose—from the old influences—which rendered the* "*old appointment illegal and void; and that merely executing* "*a new deed, and sending a dry, formal, official lawyer's letter* "*to the appointee, informing her of the new appointment, and* "*of the legal effect of the instrument, were not sufficient for* "*the purpose.*

"And, on the second point, I hold that every man must be "presumed to intend and mean that which is the natural and "necessary effect of his acts.

"Now, when the new deeds of appointment were made, things "stood thus:—

"The Duke had said in his answer in the former suit, this: "When the said deeds poll of the 19th of December, 1854, "were executed by me, I fully intended that from and after the "execution thereof the defendant, Lady Harriet Cavendish "Bentinck, should receive the whole of the dividends or in- "come and annuity thereby appointed to her: and I was aware "when and before such appointments were made that the said "defendant, Lady Harriet Cavendish Bentinck, would have, "and I intended that she should have the power, if she thought "fit to exercise it, of dealing with, and disposing of, the whole "of the dividends, yearly income, and annuity, as her own "moneys. But the said appointments were made in conse- "quence of the marriage of the plaintiff, and as the only mode "by which, as I was informed, the immediate and absolute "vesting in the plaintiff of a share of the dividends or income

"and annuity so appointed could be prevented; and I did "hope, when the said appointments were executed, that the "defendant, Lady Harriet Cavendish Bentinck, would not, on "receiving the said dividends, or income and annuity, so ap- "pointed, proceed at once to apply the whole thereof to her "own personal use and purposes, but as to a moiety thereof "would set apart the same as a fund to be dealt with in accor- "dance with the wish of the said late Duke, in the event (which "has occurred) of the plaintiff's marrying the defendant, Sir "William Topham."

"Lady Harriet knew that he had so said, and the Duke "knew that she knew it.

"In Lord Henry Bentinck's evidence in the former suit, "this apppears: 'When I say that I have heard and believe "that Lady Harriet also gave her consent to a similar pro- "posal, I mean that I heard it direct from Lady Harriet, last "July. She told me that she had agreed to carry out the "late Duke's wishes.' And the Duke knew, or must be taken "to have known, that she had so agreed.

"*Nothing was said or done before or at the time of the new "appointment to get rid of the effect of what had been so said "by the Duke, and agreed to by her. The new deeds, therefore, "must be read with reference to what had been so said and "agreed to; and they were made by an appointor who had "stated what his hope was, and what the wishes of the late "Duke were, to an appointee, who had agreed with the late "Duke to carry out those wishes. It is impossible to regard "any cesser of hope or wish, or any change of motive or wish, "if any such cesser or change there was, in the recesses of the "Duke's own mind, not communicated to the appointee; and "the new appointments must, in all courts of law, and for all "legal purposes, be considered to have been made to Lady "Harriet for the purpose of carrying out the late Duke's wishes, "and because she had agreed to carry out such wishes, and the "Duke must be held to have known that Lady Harriet would "of course receive such new appointment as bound, morally "and in honor, by such agreement.*" V. C. James, 5 Ch. Ap. Cas. 49, in deciding upon the second set of appointments. "I "think that Lord Justice Turner has clearly, and with his "usual accuracy, pointed out the true distinction between "motive and intention. The court cannot inquire into the "motive, but it can inquire into the intention or purpose. "And this is, indeed, the point on which I conceive our de- "cision of the present case must turn. If the Duke, truly "preferring Lady Harriet, either on the ground of her sister's "supposed disobedience to her father's wishes in her marriage, "or for any other reason, however capricious, intended simply "to give the property to her in preference to her sister, he is "by the power authorized to do so.

"If he, on the contrary, has not any such intention, but has "executed the instruments with the intent that Lady Harriet, "having the sole control of the fund, should abstain from deal- "ing with it as her own, and should accumulate one moiety of "it in order (according to events) either to dispose of it for "her sister's benefit, or to let it fall back according to the lim- "itations in default of appointment, then I think the distinc- "tion taken by Lord Justice Turner between intent and motive "would apply.

"The case before us is certainly subject to very considerable "difficulty. I give implicit credence, as I have before said, to "the statements of the appellants in their answers. I think "that nothing has passed between them beyond what is there "stated. But in order to appreciate the exact position of the "parties, we must, I think, have regard to all that passed "before.

"*It would be difficult, also, to hold that she had placed her- "self in such a position as to incapacitate her from accepting, "under any circumstances, a gift of the whole fund. I think "a valid appointment might have been made to her of that "fund;* but the real point for consideration is, whether or not, "though now conscious of her strict right at law to dispose of "the fund, the pressure of a moral obligation not to appropri- "ate more than one half of it to her own use, and to hold the "other half subject to the Duke's intentions, and for his pur- "poses, did not at the date of the last appointment, and does "not now weigh on her mind with such force as to convert her "into a mere passive instrument of the Duke's intentions, and "whether such her sense of moral obligation is not well known "to the Duke; and if so, whether he has taken any step what- "ever to discharge her from it, and restore her to complete "freedom of action?

"He does not say he has done so, and let us therefore look "to her own statements as to what her view of the case is, "and whether such view was not known to the Duke whilst "making the appointment; (His Lordship here read several "of the passages in Lady H. Bentinck's answer and cross- "examination set out in the statement above.)

"Can it be reasonably said that this lady stands in any "different position from that of Lord Henry, who, in one "branch of the case before the Lords Justices, had declared "himself to be a 'dummy' in the transactions in which he "was there concerned? Does not Lady Harriet describe her- "self as a mere instrument to carry into effect the will of the "Duke, whom she believes to be the depositary of her late "father's wishes on the subject? Is this difficulty removed by "the Duke's statement that there is no agreement, that he has "no hope or expectation on the subject of his sister's dealing

"with the moiety of the fund in dispute; and is it not neces-
"sary that she should be wholly freed from the notion that
"she is under any moral obligation whatever to observe the
"Duke's wishes?

"It is not for the court to point out how this may be done,
"after all that has passed. It is enough for the court to say
"that, assuming, as I think it is bound to do, that the Duke
"is aware of Lady Harriet's mind being made up to act ex-
"actly as he wishes her to do, and she declaring such to have
"always been her position, some evidence is necessary of a
"change of that purpose of the Duke, which was first evi-
"denced by the proceedings on the former appointment, and
"which has never been disavowed, because, as Mr. Amphlett
"well observed, the Duke does not desire to disavow his wishes
"upon the subject." Lord Hatherly, 5 Ch. Ap. 56, 57, 58.

"*In this state of circumstances no new appointment by the*
"*Duke of Portland—the same donee—in favor of Lady Har-*
"*riet Bentinck—the same appointee—can stand unless the*
"*effect and influence of this previous arrangement can be*
"*proved to have been so obliterated as to have put the donee of*
"*the power on the one hand, and the appointee on the other, in*
"*the same position as though no such arrangement had been*
"*brought about.*

"In my opinion, the burden of the proof requisite to sup-
"port a second appointment in such a case rests, and ought
"to rest, on the appointee. The reasons which, in the case
"of a dealing between a solicitor and a client, throw the onus
"of proof on the solicitor; between a trustee and a *cestui que*
"*trust*, on the trustee; between a parent and a child, on the
"parent; and in the class of cases to which Huguenin *v.*
"Baseley, 14 Ves. 273, belongs, on the persons seeking to
"sustain the gift; apply with equal force as between the
"appointee, in such a case as this, and the person entitled in
"default of appointment.

"*I am satisfied from Lady H. Bentinck's statements, in her*
"*answer and her cross-examination, that the original influence*
"*and obligation have existed, still exist, and are likely to*
"*exist.*

"I should have come to the same conclusion, had I thought
"that the onus of proof was on the plaintiff; but *I think it of*
"*importance to reiterate that where an appointment has been*
"*set aside by reason of what has taken place between the*
"*donee of a power and an appointee, a second appointment*
"*by the same donee to the same appointee, cannot be sustained*
"*otherwise than by clear proof on the part of the appointee,*
"*that the second appointment is perfectly free from the origi-*
"*nal taint which attached to the first.*" Giffard, L. J., 5 Ch.
Ap. 60, 61, 62.

Topham *v.* Duke of Portland is entirely unlike our case.

1. No one there claimed that the donee of the power was disqualified from acting by reason of his promise or agreement to accede to the donor's wishes; but all conceded his right to act.

2. It was alleged, however, that he did not intend to execute his power, but that his object was to carry out the donor's wishes. This illegal purpose was admitted, and the appointee was proven to be a mere "dummy" for their gratification.

3. The second deed, similar to the first, executed after a prolonged and expensive litigation bitterly contested, was held to be under the same influences as the first, because it appeared that no desire was felt, and that no effort had been made, to shake off the influence of the original arrangement.

4. The moral obligation which was objected to there was not that which resulted from the expression of the *donor's* wishes, but that which grew out of an illegal arrangement which had been entered into between the *donee* and the *appointee.*

5. The existence of this obligation rendered it utterly impossible that the power could be executed; for so long as the beneficiary felt unable to use more than a moiety of the fund, an appointment of the whole must be necessarily inoperative in part. With us, the moral obligation may exist, consistently with the exercise of the donee's judgment. If there be no conflict between the promise and the judgment the former is inoperative; if there be such conflict, then a resignation by the executor will save the promise without any violation of duty.

6. The donor's wishes were communicated to the donee *after* the power had vested and after his right in the fund had ceased. Dr. Rush's wishes were communicated before such vesting,—and whilst his right to revoke continued.

7. The wishes of the late Duke could only be gratified by the commission of a fraud upon the power with which

they were at variance. Dr. Rush's wish that the best site should be selected was not in fraud of, but in furtherance of, the power and its object.

8. It was conceded that a good appointment was possible, notwithstanding the promise and agreement, if a *bonâ fide* effort had been made to execute the power, free from their influence. The deed was condemned because it had been conclusively proven that similar ones had been made for a purpose not authorized by the power. The oath of the donee did not touch the real taint of the transaction, viz., the previously imposed and still existing, obligation upon the appointee.

9. The only effect of holding the appointment invalid was, to let the fund go amongst the children, but here the effect will be to confer upon a stranger, a power that the testator was willing to entrust only to his most intimate friend.

IV.

The proper remedy, if Mr. Williams, by reason of his promise, be disqualified from building on the lot selected, would be, to ascertain whether or not it is a proper site, and if not, to enjoin him against building thereon, which would still permit his execution of the power conferred upon him by the will.

We have shown that the complainants have sought to invent a new crime, but, like all other revolutionists, not content with this, they have also devised a barbarous and hitherto unheard-of punishment. With them there is no *locus penitentiæ*, but the Guillotine is immediately demanded —though, being needed for equitable purposes, they call

it a "Decree," and precede the punishment with what, with grim humor, they call a "prayer."

There is no pretence that the executor's judgment in *ordinary* cases is defective, but simply that it has been unduly biassed in favor of one particular locality. Would not every end be gained by forbidding him to build there? The testator's wishes could still be partially carried out. Under the decree as made, however, this will be impossible. Few physicians would recommend decapitation as a cure for the headache.

We have shown that there is no precedent for equitable interference in a case like this, and we may safely assert that there is no precedent for an exercise by a Master, of a discretion confided to another, clear of all accusation of fraud, and in full possession of his mental faculties.

In most of the cases cited by complainants, there was a provision over, in default of appointment. Here there is none. The power must be executed by some one. Can any one else exercise it as well as the executor? The testator thought not. Why shall not his wishes be respected?

Is the Master to decide upon his own judgment or upon the judgment of others as gathered by him from their testimony? In either event we may confidently predict that a lot will be chosen such as Dr. Rush would never have selected.

Mr. Williams still possesses the right to say how much shall be expended in the building. The purchase of the lot and the erection thereon of a building, can only be economically and intelligently made, by the same person. Who must yield if there be a misunderstanding between the master and the executor as to the respective amounts to be expended upon the purchase, and the building?

In any event we submit, the present decree must be *modified.*

V.

With some general remarks we will conclude our argument.

What we have said may not carry with it conviction, but it is impossible to ignore the fact that the interference asked for, and the reason assigned for the asking, are without precedent, and of most doubtful right. The dangers to be apprehended from an accession to the complainant's demands are great and certain.

A stranger will be put in the place of one to whom Dr. Rush's confidence was given, and whose judgment was required, to mould the vast bounty he intended to bestow. A cardinal desire of the testator, manifested in every page of the written will, must be utterly frustrated. In place of the harmony he hoped to secure, by placing the whole disposition under one control, will follow the confusion that must result from the counter-workings of two minds.

All this will be done, though the executor has been guilty of no fraud, but has honestly striven to do his whole duty, and believes that he has done it, to the prejudice of a great PUBLIC LIBRARY, at the instance of a private corporation which declined to thank the testator, which is undecided to-day as to whether it will or will not accept the bequest, which has refused to apply for such legislation as would enable it to carry out, to its full extent, the spirit of the will, and which may ultimately refuse to take.

The desire of Dr. Rush to secure the erection of a MONUMENT to his wife and her father will assuredly be lost sight of in the testimony of interested parties, by which the Master will be governed.

And why must all this be done? Simply because, in the

selection of a site for the library building, in the exercise of what he believes to be his unbiased judgment, the executor has chosen one that, in the opinion of the testator himself, was best adapted to his purposes. Ordinarily the court struggles hard to get at the intentions of a testator; but here, the executor must be disqualified because he is trying to execute them.

If there be a doubt, surely that doubt should not be given against the executor, when the sole consequence of a refusal to do so will be, that the anxious wishes of the donor will be gratified, and that a site will be adopted which the man most interested was so anxious to secure.

We earnestly urge upon the court that it will refuse to interfere with an executor who honestly exercises the best judgment he possesses, with the intent to execute the power as written in the will; that it will not condemn him without cause; and that it will not subvert the testator's written will, upon mere suspicion.

We summarize what we have urged as follows:—

1. There is no proof that Mr. Williams selected the Broad and Christian Street lot, under the influence of his promise.

2. The evidence, from his declarations long before litigation, that it was selected because in his judgment it was "most expedient," is overwhelming, and it is corroborated by the fact that he came to the same conclusion before any promise was given.

3. Mr. Williams is competent to testify as to his intention in selecting the site and as to the reasons which governed him.

4. A judgment as to the fitness of a site is not necessarily influenced by a promise to build nowhere else, especially where the party who gave the promise is aware of his duty to act independently of its influence, and would, by a resignation, if his judgment were adverse, keep his promise without violating his duty.

5. If Mr. Williams' judgment was warped by his promise, yet if he did, immediately upon the vesting of the power, do everything possible to shake off its influence, and did honestly exercise his own judgment to the best of his ability, no beneficiary has a right to ask more, nor to demand his removal because of his judgment being thus warped by what occurred prior to his appointment.

6. Mr. Williams did everything he possibly could to enable him to exercise his judgment, endeavored to exercise it to the best of his ability, and believes that he has chosen the most expedient site.

7. No *mala-fides* has been proven in the present case, such as will justify the interference of a court of equity.

8. Though Mr. Williams' judgment be warped as to this particular site, equity can do no more than enjoin him against its selection, and, subject to such injunction, must leave him to exercise his power.

9. The necessity or right of interference in the present case is too doubtful, and the violation of the testator's will, by granting the relief prayed for, will be too certain, to justify the maintenance of the present decree, especially in view of the well-considered opinion of the testator in favor of the site selected.

JOHN G. JOHNSON,
GEORGE JUNKIN,
GEORGE W. WOODWARD,
For Appellant.

inches
centimeters
Don Williams
Golden Thread
D50 Illuminant, 2 degree observer
Density
Colors by Munsell Color Services Lab